THE LAW OF EQUITY AND TRUSTS

INTRODUCTION TO EQUITY

Maitland said in 1936, ''if we were asked what is the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence I cannot think that we should have any better answer to give than this, namely the development from century to century of the trust idea.''

The origins of Equity

- Equity is a system of law historically developed in the Court of Chancery correcting unconsciousble conduct on the part of a defendant.
- It was developed by the Court of Chancery to solve deficiencies of the common law and correct unconsciousble conduct.
- The Chancellor recognized the inability of the common law to deal with social and economic changes taking place in society.
- It administered equitable relief by asking the defendant to personally appear before him "personam".
- It is a system of principle and precedent rather than a system of ad hoc justice.
- It developed as a means of overcoming perceived shortcomings and unfairness in the common law system. The feudal system, as it developed after 1066, required formal mechanisms for transferring land, in order to protect feudal dues. The *use* (later known as the trust) developed to circumvent this. Meaning in order to transfer land from one person to another individual, they needed to have a recognizable legal title that is clearly to whom it was for.

The common law courts recognized only legal title. The practice developed of petitioning the king, through the chancellor, to exercise discretionary powers, which operated against individuals (in personum). This personal jurisdiction, based on conscience, was the basis of early equitable jurisdiction.

What is equity?

Equity means fair and just and/or it is also regarded as "specific body of law which supplements the common law and is invoked in circumstances where the conduct of a defendant is deemed unconsciousable".

- It is a peculiar concept which is unique to English and Welsh law
- From "a patchwork of tribal customs" (Hudson) to a system of law that is <u>common</u> to the entire realm
- This is the means through which the law balances and considers the need to achieve fair results in individual circumstances
    - "Equity can be described as the body of rules which evolved from those rules applied and administered by the Court of Chancery before the Judicature Acts 1873 and 1875" per Hayton& Marshall

- Lord Halper said in 1705 ‘’equity is no part of the (common) law, but a moral virtue which qualifies, moderates and reforms the rigour hardness and edge of the law and its truth, and it assists the law where it is weak in the constitution and defends the law from crafty invasions and delusions which are against the justice of the law’’ essentially assists the law
    - Equity doesn’t destroy the law as everyone has the right to the law, but equity assists it and acts consciously in the sense that on occasions it would be immoral for a certain person to assert a certain legal right
- Equity exists to supplement the law where the common law remedy will fall short of justice
- Equity consists “of distinct body of rules that seeks to introduce ethical values into the legal norms”.
- It intervened in matters that thought to have been influenced by the inequality of bargaining power between lender and borrower.
- The fact that equity acts *In Personum* is unique in that it means a court will make an order based on individual facts of the case to prevent a particular defendant from acting in an unconscionable manner

The idea of conscience in the law of equity:

- Fortescue asserted the notion in 1452 that in cases of equity ‘’we are to argue conscience here and not the law’’
- The principal doctrine of equity revolves around the notion that it acts *In Personum* on the conscience of the defendant; concerns itself with whether or not a defendant has acted in good conscience on an individual basis
- Lord Browne-Wilkinson reasserted the idea that equity acts on the conscience of the owner of the legal interest
- The idea of conscience being a significant factor in the law of equity comes from the ancient understanding that courts of equity were essentially courts of conscience and that the Lord Chancellor was the keeper of the monarch’s conscience
    - Rules of equity historically seen as the means by which the monarch’s power was used in a manner so as to ensure that justice and good conscience are enforced
- In the *Earl of Oxford’s Case* it was made clear that equity is enforced on a case to case basis depending on the conscience of the defendant and equitable rules are an ethical response to what would otherwise be a passive agreement to the unconscionable actions of the defendant.
- English equity shouldn’t be taken to mean a person can merely cause a ruckus at lost benefits; courts must find the defendants intention to be blameworthy and unconscionable

- Lord Ellesmere in the ***Earl of Oxford*** case felt that there were a multiplicity of actions which could be undertaken by members of society and so a general law would be impossible to enforce in a befitting manner as it would lead to the inevitable failure of the law to adequately meet certain circumstances

- Immanuel Kant felt that equity isn't merely summoning another to perform an ethical duty but rather is the requirement for the court to refrain the defendant from acting in bad conscience whilst simultaneously upholding the equitable rights of a claimant

- Equity can also be seen to be a moral virtue, as stated by Lord Chancellor Cowper in 1705 who reiterated Aristotle's view that equity is a means of preventing unfairness which would arise out of the strict application of formal legal rules

Development of equity:

- Hudson describes the administrative of law prior to 1066 as a ''patchwork of tribal customs''

- Normans sought to make a system of law common to the nation and not dependant on local customs

    - Normans conqueror sought to centralize the law by utilizing the best methods and applying it equally throughout the nation

    - The remedy was sought to be the same regardless of your geographical location

    - By the 12th century most cases were still heard in local shire courts by local lords, meaning the king and his court had to travel across the realm distributing the justice; chancellor was the keeper of the king's conscience and therefore gave him great power to issue royal writs on behalf of the crown.

- In a time when monarchy was everything the King was in charge and so to be the best friend of the monarch implied that you had a great degree of power

- As the law grew and the common law system began to take effect, the king delegated many of his powers to his lord chancellor to act on his behalf; it was his discretion that became the foundation of equity as a concept

    - The Lord Chancellor as the keeper of the King's conscience and keeper of the King's seal

    - In the ***Earl of Oxford case*** it was said how equity ''mitigates the rigour of the common law''.

- **Royal writs were issued to deal with matters falling within the kings special concern or prerogative power**

    - Certain issues which the king has a personal interest in ensuring the smooth transmission are below

        - Treason

        - Murder
        - **Unjust judgments**
        - **Default of justice**
    - Such concern and prerogatives were delegated to the lord chancellor to deal with
    - The last two matters were the ‘’seed of equity’’
    - Ultimate check on the power of the courts by the monarch; mirrors the concept of judicial review which is a more modern and evolved concept
    - Courts of common law kept the power of the lord chancellor in check
- Problem however in that if your complaint didn’t fall within the ambit of the common law it could leave you without a remedy
    - As the system grew it wasn’t sufficient to write out an individual cause of action moulded uniquely to the needs of the individual
    - The cause of action became more rigid and less personal having the effect that people would be turned away; arguably a failure of justice for which the lord chancellor would be invoked
    - If you have a problem which doesn’t fit into the common law system of justice then you could utilise the equitable doctrine
- The Courts of Chancery provided a platform from which the Lord Chancellor could exercise his discretion
    - Asked questions of fairness and equitableness when determining an outcome
        - Ideas of conscionability. Arguably very subjective in nature?
    - His solutions would be based on fairness equity and conscience
    - Depended on particular facts of the case and the lord chancellor presiding over the appeal
    - John Seldon essentially made the point that because of the personal nature of appeal in an equitable court, you cannot be certain as to the remedy available; measure of justice has often been equated to the length of the chancellor’s foot
        - “Equity is a roguish thing - for law, we have a measure, equity is according to the conscience of him who is Chancellor and as that, is longer or narrower, so is equity. Tis al one, as if they should make the standard for the measure – a Chancellor’s foot.”
    - Equity plays a balancing act between individual injustice and the otherwise consistent application of common and statutory law

- The German philosopher Hegel was of the opinion that the court, in cases of equity, is more concerned with the merits of the case between the claimant and defendant, not wholly considering the wider reach and context of the law

- Petitions from the common law to the chancellor grew over the 14th and 15th century establishing a court of chancery whose decisions were recorded and reported in the same manner as the common law courts.

    - Growth of a separate body of law; one legal and one equity

    - Such a growth meant a greater degree of rivalry between the two courts due to the nature in which remedies were provided and enforced

    - Although rare nowadays, in ***Jaggard v Sawyer*** it was illustrated how equity provided a degree of general discretion to set aside statutory and common law rules in good conscience

- Jill Martin provides an example in a dispute of ownership of land whereby A has the legal title to the land (meaning legally he owns the land and in a common law court she would be awarded the land) but C was going to the crusades and has a wife and two daughters whom he cannot give the land to (due to prevailing laws of inheritance and ownership) and so C gives the land to A on the basis that the title to the land is held (in the event of his death) for the benefit of B (wife and kids). In conscience the wife and kids would own the land (upheld in court of chancery/ equity).

    - Equity can provide an often just conclusion

    - Remedies in such cases work in persona and doesn't change ownership and the law but merely on an individual basis; common law remains unscathed but A's conscience is bound

    - Equity examines the conscience of the individual defendant

- Equity has a somewhat moral basis in that it can be seen as a way in which unfairness is prevented through ensuring a statutory rule doesn't have an unjust outcome; form of natural justice as picked up on in *Lord Dudley v Lady Dudley*

    - Prevents defendant taking advantage of a situation which would result in an unconscionable result

    - Nevertheless there is a great degree of substantive evolution in regard to equity as a concept and therefore a great development in fairness as it broadens the scope.

- Hudson suggests that the flexibility offered through the law of equity in individual cases ensures the law and courts are able to cope and adjudicate, with social matters and progression borne in mind

Equity never meant there had to be a change or variation in the law; the remedy doesn't change the common law but is aimed at the conscience of the individual to whom it is addressed

- There were means by which the equitable order was enforced. The power to back up his resolution laid in the fact it was a contempt of court to not carry out the prescribed course of conduct
- In the ***Earl of Oxford's Case*** a defeated defendant applied for an injunction (equitable remedy) alleging a loss of his previous trial on the basis of injustice; such a remedy was to protect against common law remedy
    - Defendant was indicted for not complying with common law prescription however Lord Ellesmere was of the opinion that this remedy was affected solely *In Persona* and so didn't affect the common law or undermine it; merely justice being given and handed down in an individual case
    - Held by Lord Ellesmere that "the office of the Chancellor is to correct men's consciences for frauds, breaches of trusts, wrongs and oppressions of what nature so ever they be, and to soften and mollify the extremity of the law."
- ***Shalson v Russo*** showed that where an equitable remedy is breached this can nevertheless result in some sort of punishment most often in the form of a prison sentence

Where equity and law conflict, equity shall prevail and most commentators agree that the focus in equity reflects the politics of the time

- "where equity and law conflict, equity prevails"
- Sir Edward Cope favoured supremacy of the law over the monarch (who's will was enforced via equity) and clearly this was met with disdain as not soon after he lost his job

Problems nevertheless remained in the equitable jurisdiction:

- Some of these were addressed in the form of the two **Judicature acts of 1873 and 1875**
- The acts established a concurrent jurisdiction which could put into practice both common law and equitable considerations
- Now all judges played a role in both common law and equity
- Equitable remedies will always remain at the discretion of the court; need to ask the court to exercise its jurisdiction who will consider whether or not it would be unconscionable to allow a person's legal rights to be enforced
- Both common law and equity are now administered in any and all courts
- Statute sets into stone the concept that equity will always prevail if it conflicts with the common
- Since this act, both equity and common law have been administered in the same courts

- Despite the intertwining of the two courts as one, the intellectual separation of the principles of the courts remains; result of the 1873 and 1875 acts was that a practical distinction between the courts ceased to exist
- In the 1882 case of ***Walsh v Lonsdale*** there was a lease agreement for 7 years which provided the rent was payable in advance if so demanded:
    - Neither of the parties got round to executing the deed needed to make the lease legally binding, yet the tenant Walsh moved onto the land
    - When the tenant fell into arrears, the landlord demanded rent in advance as per the agreement. However when it wasn't paid the landlord distrained (legal remedy which allowed landlord to seize the tenants goods and sell them in lue of the rent)
    - Tenant then proceeded to pursue an injunction so as to prevent the landlord from carrying out his particular course of conduct; felt it to be illegal due to the lack of formal agreement of the lease. Trying to rely on the absence of a fully legal lease
    - Essentially asking for an equitable remedy but this failed as it would not be equitable and in consideration of conscionable factors to allow for such a claim to succeed
    - Even though there was absence of the legal formalities, equity will not allow such a factor to be utilized in such an unconscionable manner; obliged to carry out his part of the agreement
    - Oral agreement was as good in equity as an actual written lease
    - Two equitable maxims:
        - 1) equity sees as done that which is ought to be done
        - 2)those who come to equity must come with clean hands
    - Case demonstrates distinction between legal and equitable doctrines and how equity will always prevail

Maxims of Equity

1. Equity will not suffer a wrong without a remedy

    - Not quite as far reaching as it sounds. Concerned with unconscionable reliance of legal rights, showing that equity will sometimes fill the void for which the common law is incapable of filling; will fix the wrong
    - Equity intercedes to ensure that a fair result is reached; essentially provides a remedy in a situation where there is none but justice demands there should be some available
    - For example, in the context of a contract, it maybe perfectly recognized at common law in that is has satisfied all the common law requirements as to form. However, if such a contract has been entered into on grounds of fraud, mistake or undo influence to escape contractual liability. Then equity can put the contract to an end by the remedy of recession.

2. Equity follows the law

    - Follows the law, but not slavishly and all the time. If equity truly exists to supplement the law, its remit cannot be wider than the reach of the law. Equity is bound to follow statutes in all cases but doesn't mean it comes secondary to the law.
    - Equity developed as a response to the defects of the common law, however it did not aim to override the common law. If there is conflict exists between the two, equity prevails.
    - Principles of equity have always overruled the common law rules, as the *Earl of Oxford* case demonstrated with James I intervention, however the common law in itself takes priority

3. **Where there is equal equity, the law shall prevail**

    - Where two parties have equal equitable rights the ordinary common law rules will prevail
    - Where no distinction is available between parties and who is more suited to pursue a claim in equity then the common law principle best suited will be applied
    - For example where two parties have been fraudulently induced into purchasing the same goods from a party then none has a better claim in equity; ordinary common law rules would be applied

4. **Where the equities are equal, the first in time shall prevail**

    - Where two claimants have equally strong cases, the person who acquired their rights first will be the one to prevail; first in time is the first in right.
    - In reflection of the commercial element of equity, time is of the essence
    - Whoever acquired their rights first will be in the favourable view of equity

5. **Delay defeats equity**

   - ''Equity aids the vigilant and not the indolent'' time is important and equity may choose not to protect rights due to lapse of time
   - ***Smith v Clay*** is an example illustrating that if too much time has lapsed between the facts and the proceedings, then any respective rights will not be upheld; known as ''laches''
   - ***Nelson v Rye*** demonstrates that such an approach should be taken to calculate where the balance of good conscience lies in the light of such a delay

6. **He who seeks equity must do equity**

   - Anyone claiming the aid of equity will not be aided unless they have acted fairly themselves
   - The claimant will not receive the support of the court if they've acted in an unfair manner themselves
   - With injunctions for example, they will only be awarded if the claimant themselves agree to carry out their own obligations

7. **He who comes to equity must come with clean hands**

   - Means you cannot act hypocritically so as to uphold an equitable relief if you are not acting in an equitable manner yourself.
   - ''clean hands'' approach
   - An example of person with no clean hands is **Lee v Haley** **where the** claimants sought an injunction to protect their coal business. It was denied by the Court of Appeal on the basis of fraudulent.

8. **Equality is equity**

   - Where two or more parties have an interest in the same property, as a last resort equity may divide the interest between them where there is vagueness as to such division
   - In ***Jones v Maynard*** the approach was taken (reflecting Artistotle's view) that equality is the proper basis for justice
   - Typically in cases involving property, where two people have an equal claim to it then the assets will be divided in an equal manner
   - Nevertheless on some occasions, equal division is the last thing envisaged by the trust settlor and so the courts will try to give effect to their intentions if possible.

9. **Equity looks to the intent rather than to the form**

   - Intention is always considered and prioritised over form; doesn't matter if form wasn't met, it will be the intention that is contemplated

- Courts seek to give effect to the substance of transactions as opposed to the mere surface appearance of it; ***Springer v Lee*** made it clear that any unnecessary formalities will be ignored

10. Equity looks on as done that which ought to be done

- It will look on as done for the purpose of equity
- Courts of equity will consider something to have been done if the court believes it should ought to have been done
- In ***Walsh v Lonsdale***, a binding contract to grant a lease was felt to give rise to an equitable lease even though the formalities weren't observed

11. Equity imputes an intention to fulfil an obligation

- Equity will presume that if A had an obligation to B, he had an intention to fulfil that obligation even if what he carried out was similar as opposed to exactly the same
- If a person was required to carry out an obligation and carries out acts which aren't strictly required, it will still suffice to be performance of the obligation

12. Equity acts in personal

- Equity is always directed at the person and doesn't serve to undermine the law; conscience of the person is affected and they will be obliged to carry out the course of conduct
- The jurisdiction of equitable courts operates on individual defendants regardless of whether or not they're in English jurisdiction as Lord Selbourne stated in ***Ewing v Orr Ewing*** that ''courts of equity in England are, and have always been, courts of conscience acting *In Personum*''

13. Equity will not permit statute or common law to be used as an engine of fraud

- The fact a law required a certain standard but this standard wasn't met, equity will not allow this statute and law to be used for the wrong purposes
- Equity will not usually contradict common law or statutes it will nevertheless act *In Personum* against the defendant's conscience to prevent them from taking an inequitable advantage of the other party

14. Where equity and the law conflict, equity shall prevail

- Result of judgment from the *Earl of Oxford* case and the Judicature Acts of 1873 and 1875

- Very nature of equity is that it is flexible and aims to avoid the injustice of the common law and those who exercise their equitable discretion almost set the parameters as to how the discretion should be utilised; certain informal limitations

and these are the fundamental principles. According to Hudson they are ''vague ethical statements'', according to Watson they aren't rules but ''flexible tools''

- No rules as to which maxim should prevail if two are in conflict
- Should be used as a guide for judges exercising their discretion in assessing the conscience of the defendant

EQUITABLE REMEDIES

One of the most significant applications of equity today is the wide range of equitable remedies that are available. Two equitable remedies in particular which illustrate the discretionary and personal nature of equity are those of specific performance and injunctions.

The common law usually provides damages as the remedy for any breach, nevertheless the fact remains that damages will not always provide a suitable or adequate remedy. It is at this point that equity comes into play utilizing the idea that ''equity will not suffer a wrong without a remedy'':

- The number of equitable remedies available to address the limitation of the common law response are available at the discretion of the court
- Despite remaining at the discretion of the court, the exercise of such jurisdiction depends on already established/recognized principles
- Only available where compensatory damages are not held to be adequate

Equitable jurisdiction in regards to remedies can be used to enforce and protect both legal and equitable rights and is available whenever there is an actual/threatened infringement of such rights

- Vast range of equitable remedies ranging from personal to proprietary (rights in the actual property itself, bypassing the person)
- By not following an equitable order a person can be held in contempt of court
- Two remedies focused on are specific performance and injunctions

1) Specific Performance

To put it simply, **specific performance** is ''an order of the court compelling a defendant personally to do what he has contractually promised to do,'' as said by David Peyton

- The common law allows a defendant who acts in breach of contract to pay damages: equity can order the defendant to do what he promised to do.
- Equity only kicks in where it would be unconscionable for a person to rely on their legal rights

Always awarded at the discretion of the court:

- The remedy is discretionary, never available as of right, although in some cases, such as contract for the sale of land, unique goods, and shared in a private company, specific performance is generally ordered, as damages would be an inadequate remedy
- Both the high court and the county court have jurisdiction to award equitable remedies, but the power to do so are now generally exercised in accordance with established equitable precedents

The remedy is awarded *In Personum*:

- The remedy operates and is awarded in personum through the imposition of a personal obligation on the defendant to perform a specific contractual obligation and will be in relation to contracts where the particular subject matter has some significance
    - Once again, must be made clear that the equitable remedy of specific performance is an action undertaken by the court to compel the defendant into performing their original obligation under the contract; usually where monetary damages will be insufficient and incapable of providing an appropriate remedy. In other words, it means the when it comes to specific performance remedy the court will take action in ordering the defendant to finish the contractual obligation he signed at the beginning as remedies in terms of damages would be insufficient to compensate for any sort of the loss.

First thing the law will do before awarding an equitable remedy is look at the adequacy of the common law remedy

- Damages will be considered inadequate when the obligation the claimant seeks to enforce is unique in the context of the contract
- In cases of contracts being breached, if damages would make adequate reparation they would suffice, If not then specific performance would be prescribed
- Regarded in English law as an exceptional remedy to which an exceptional plaintiff is awarded as of right, and according to Lord Hoffmann as doing justice in cases where the common law would be inadequate, as said in ***Co-operative Insurance v Argyll Stored Ltd***

Specific performance and contracts:

When looking at different types of contract which may be subject to specific performance, the award of monetary damages must firstly be found to be insufficient. Distinguish between remedies in law and in equity dependant on the discretion of the court; where damages would provide sufficient remedies or where it would be impossible to supervise the enactment of the equitable remedy then the common law remedy would be utilized

Contracts relating to land:

- Any award of damages would be insufficient to compensate for the loss of a parcel of land in the sense that the plot of land wouldn't be the same and would be inherently different due to the unique nature of every plot of land
    - Thing you can buy through a monetary award of damages would not be the same
- In ***Sudbrook Trading Estate v Eggleton*** there was a lease of land from the defendant and at the end of the lease agreement the land could be purchased, however the sellers refused to appoint a valuer and therefore the sale couldn't proceed
    - Held that the agreement between the parties was certain and the court would appoint their own valuer so as to uphold the agreement and allow for the sale of the land to proceed
    - Courts said damages were not sufficient and so the provision of the valuer would be done by the court if the defendant couldn't provide
    - This is a case where the seller refused to go ahead
- In cases where the buyer refuses to perform their contractual obligation then the common law remedy of monetary damages would be sufficient and adequate in such cases as all the seller would have received was money anyway; great distinction in the context of contracts relating to land
    - Such a variation between adequacy of damages is down to the fact that each parcel of land is unique
- Sir John Leach VC in ***Adderley v Dixon*** once again reiterated this idea of specific performance being granted on the basis of a common law remedy being inadequate, and he expressed this by saying that specific performance is decreed when dealing with contracts for which ''damages at law may not, in the particular case, afford a complete remedy. Thus a court of Equity decrees performance of a contract for land, not because of the real nature of the land, but because damages at law, which must be calculated upon the general money value of land, may not be a complete remedy to the purchaser to whom the land may have a peculiar and special value''

Contracts relating to chattels:

- By chattel, it is meant anything that isn't real estate

- Underlying principle in relation to such contracts is that specific performance will be ordered in circumstances in which the chattel has a particular intrinsic value such that it would not be readily possible to acquire a substitute chattel
    - if the thing in question can be bought elsewhere then the award of damages will be appropriate because in such cases the amount would be as complete a remedy as the stock contracted for, as said again by Sir John Leach VC in *Adderley v Dixon*
    - For example if there is only one of the item in question available
- Equitable remedy would not often be available for stock or goods
- Usually specific performance would not be ordered as compensation would be a complete remedy in itself
- In the case of ***Falcke v Graythe*** antique vase couldn't be purchased anywhere else and so specific performance to sell the vase was ordered
- ***Thorn v Commissioner of Public Works*** once again demonstrated specific performance being ordered
- An injunction was granted in the case of ***Sky Petroleum v VIP Petroleum*** as it would effectively have the same effect in the circumstances
    - VIP agreed to supply all the petrol for Sky and in 1973 there was a national petrol shortage and VIP purported to terminate the agreement for sky meaning that sky would essentially be deprived of petrol
    - Question was whether court could order specific performance for VIP to uphold their agreement
    - Goulding J granted an injunction to restrain the withholding of VIP's services so as to prohibit them from breaching their contract; acknowledged that what he had done amounted to a decree of specific performance
        - Reasoned that normally specific performance wouldn't be adequate but in this case damages would be inadequate as it would have meant sky going out of business
        - If the plaintiffs were not entitled to one equitable remedy then why should they be entitled to another was the question that arose
    - In fairness and conscience if they weren't entitled to specific performance then why should they be entitled to an injunction
- ***Neville v Wilson*** also differentiated between stocks in the context of acquiring substitute goods elsewhere; could draw a distinction between contract for the sale of shares one could easily obtain on the stock exchange (for which damages would be a sufficient remedy) and shares in a private company which couldn't otherwise be acquired (giving rise to specific performance).

Illegal/immoral contracts:

- It would be contrary to public policy to order specific performance of a contract which would be either illegal or immoral
    - Technically there would be nothing to enforce
- In the case of ***Wroth v Tyler*** there was a charge being registered against the property which gave the wife the right to not be evicted, and the purchasers sued for specific performance
    - Action failed on two grounds as to carry out the contract it would mean the husband would have to carry out proceedings against his wife; highly undesirable
    - Meant the purchaser could evict the husband and daughter but not the wife and this was held to be absurd and contrary to public policy
    - Would be contrary to policy to uphold a contract of such a degree of immorality
- Equity would not allow for an action entered into through unclean hands to be upheld; illegal contracts per se are void however certain types of contract would mean the court would look as issues of morality. Once again equity will not act in favour of those with ‘’unclean hands’’.

Contracts made without consideration:

- It is logical to presuppose that for there to be specific performance decreed, there needs to be an enforceable contract; for there to be a valid contract it is a prerequisite of English contract law that there must be consideration
- The case of ***Penn v Baltimore*** demonstrated how a contract would never be upheld in the absence of consideration, except in cases of covenant, deed or will
- Specific performance would never be ordered in the absence of consideration
- More importantly, equity will not assist a volunteer, and therefore the court will not order specific performance to assist a person who has not provided consideration in relation to a contract, and this concept was made clear in *Cannon v Hartley*

Contracts involving personal skill and employment:

- Where a contract relates to a specific unique skill possessed by an individual it would normally be expected that damages wouldn’t be adequate
    - However this is the clearest example of contracts which will not be specifically enforced on the basis that an order of specific performance would be inappropriate in the circumstances
    - To force people together against their will would be inappropriate on policy matters

- In the case of ***R v Incorporated Froebel Institute, ex parte L*** the parents asked the courts to make the school educate their child but the court proceeded to refuse this request
    - Tucker J was reluctant in regard to people being forced into daily contact with each other contrary to their will
- Contracts of employment however are governed by the consolidation act which states how ‘’no court shall by way of specific performance compel an employee to do any work” as to do so would essentially turn a contract of employment into a contract of slavery; decree of specific performance in such cases wouldn’t be tolerated.
    - Principle initially came from the case of *De Francesco v Barnum*
    - Policy considerations underpin the exercise of the courts discretion in relation to specific performance
    - Essential to distinguish between contracts FOR service and contracts OF service. Only in contracts OF service (as set out in ***Warner Bros v Nelson***) will the specific performance not be granted due to the risk of turning it into a contract of slavery. However as ***Posner v Scott-Lewis*** demonstrated where the task is discrete and clearly defined in contracts FOR service then specific performance may nevertheless be enforced.
- Megarry J in ***CH Giles & Co v Morris*** stated how such contracts wouldnt be specifically enforced due to the impossibility for the court to supervise the exercising of a person’s skills as provided in the contract

Contracts requiring supervision:

- Links in a few ways to the above category. For example, the court wouldn’t specifically force a singing teacher to teach as it would be very difficult, if not impossible, to supervise such an order as there are no means by which the court can enforce the fulfilment of the teacher’s duties
- In ***Ryan v Mutual Tontine Westminster Chambers Association*** a prime example was provided through which the rule was demonstrated. The provision in the contract was an express undertaking that a porter would be provided for a block of flats, nevertheless it was held that the court wouldn’t order specific performance as to ensure it was being complied with would mean that they would have to check on a regular basis that a porter was present
- If the granting of specific performance required the constant supervision of the court then it will not be awarded. For example in ***Co-Op v Argyll*** the house of lords reversed the court of appeal’s requirement that the store remain open during normal business hours on the basis that to enforce such a contract would require the constant supervision of the courts
- Equity will not act in vain; if the courts are to exercise its discretion it wants to be sure that the things ordered to be done will actually be done

- More often than not in such cases specific performance will not be ordered; against policy and unenforceable
- ***CH Giles v Morris*** is a prime example, Megarry J said the performance of such obligations (in regard to singer performing her part of the contract) could not be specifically performed as who is to say if she was doing it properly
    - No rule per se denying performance but was a question depending on each case
    - Equity could never know if she was performing properly
- Must be noted however that if it is merely the case that a certain result is required by the court then specific performance can still be awarded; no supervision needed but nevertheless a result is desired and must be reached, such as in the case of specific performance awarding a building contract as in ***Wolverhampton Corporation v Emmons*** where it was justified that compliance on such a basis could be determined upon completion of the work.

Contracts relating to money or commerce:

- The award of financial compensation would usually be sufficient in such cases
- General rule in such contracts is that damages would be sufficient and specific performance wouldn't normally be adequate or appropriate; damages are undoubtedly a sufficient and adequate remedy for a cash-settled contract
- Exception was demonstrated in ***Beswick v Beswick*** where uncle agreed to transfer assets to his nephew so long as he fulfilled his duties and nephew promised to give aunt her annual immunity. Despite fact he contractually promised his uncle, an action was brought through an administrative function as opposed to her nature and so could bring the action on behalf of the deceased uncle himself
    - Court ordered specific performance as any award of damages would be nominal as she hadn't technically lost anything
    - Despite being an award for money it was held that damages would be an insufficient remedy as it would have been impossible to predict the value of annuity for the future
    - Court reasoned that even if they ordered damages in this one case it would have to be repeated annually
    - Demonstration that whilst the general rule is indeed in place, there are situations where contracts for the payment of money will be specifically enforceable
    - Shows how there are indeed limitations to the common law and so equity comes to its assistance to enforce the contract now and for the future thus avoiding trouble and expenditure which would be caused through a multiplicity of cases

Finally, in the context of mutuality, it follows the approach that if by the nature of the contract itself, A cannot obtain specific performance against B, then B wouldn't be granted specific performance against A.

Defences to specific performance:

Invalid contract:

- If a contract isn't valid then there cannot be an enforcement of specific performance
- Logical prerequisite that the contract is valid in the first place

Misrepresentation and undue influence:

- If the agreement is vitiated by misrepresentation or undue influence for example, then equity wouldn't order the contract to be specifically performed
- Where the claimant has induced the defendant into entering the contract via misrepresentation, then the court will not make an order for specific performance in favour of the claimant
- Idea that such a claimant shouldn't be allowed to rely on their own wrongdoing to force the defendant to perform the contract
- In such cases the claimant will be entitled to rescind the contract
- He who comes to equity must come with clean hands

Rescission:

- Contract may be rescinded as a result of the aforementioned vitiating factors

Mistake:

- Where there has been a mistake which has operated to induce a defendant to enter into a contract, it would be inequitable in many circumstances to entitle the claimant to enforce that contract against the defendant
- Where the contract has been entered into through the mistake of the defendant, then the courts will not allow for specific performance to be imposed; as it is an equitable remedy, where imposing it would be inequitable on the basis of mistake then clearly the courts will not allow it to be used.
- Courts may order rescission but not specific performance in such cases as equity only steps in to stop a person's rights being compromised on an unconscionable basis

Laches/delay/lapse of time:

- A delay in seeking an equitable remedy can sometimes mean it will be refused, such as in ***Hyundai Shipping*** where the courts agreed that whilst there was duress due to the lapse of time a remedy wasn't available

- The case of ***Lazard Bros v Fairfield Properties*** set out that the proper approach is to consider the subject matter of the contract and to decide on that basis whether or not specific enforcement of the contract has justly to be denied as a result of the parties delay

- Delay will defeat equity

Under Section 50 of the Supreme Court Act 1981:

- May award damages in addition to or in substitution for an injunction or specific performance

- Demonstrates how it doesn't have to be either/or

- Therefore the court has a statutory discretion to decide that on the facts in front of it, while specific performance might ordinarily be available, an award of cash damages would be a sufficient and suitable remedy for the harm which the applicant would suffer by reason of the respondent's failure to perform its specific obligations under the contract

- Court has statutory discretion

2) Injunctions

These are orders made by the court to a defendant to do something (mandatory) or not do something (prohibitory)

Jurisdiction:

Section 37(1) of the Supreme Court Act 1981 provides that ''the High Court may by order (whether interlocutory or final) grant an injunction in all cases in which it appears to the court to be just and convenient to do so."

The role of providing injunctions was iterated in the case of ***Mercedes Benz AG v Leiduck*** as to avoid injustice. Lord Nicholls said ''the court may grant an injunction against a party properly before it where it is required to avoid injustice. The exercise of the jurisdiction must be principles, but the criterion is injustice. Injustice is to be viewed and decided in the light of today's conditions and standards, not those of yester-year.''

General principles:

Whilst specific performance is usually to do with contracts, injunctions can be used in a wide variety of situations; no limit as to the problem you can ask an injunction to solve.

Need for some legal or equitable right/cause of action:

- The case of ***Day v Brownrigg*** made it perfectly clear that there needs to be some right of the applicant which has been infringed and affected

    - Neighbours lived next door to each other both called Ashford Lodge but the defendant's property was initially called Ashford Villa

    - Claim was refused as the original owner of Ashford Lodge had suffered no loss as there was no right in property as to the name

- In ***Paton v Trustees of the British Pregnancy Advisory Service*** it was famously held that a husband has no legal or equitable right to stop his wife from having an abortion, or to stop a doctor from performing an abortion; no right to an injunction as he had no rights in equity.
    - Sir George Baker P felt that there ‘’must be a legal right enforceable in law or in equity before the applicant can obtain an injunction from the court to restrain an infringement of that right.’’ Equity doesn’t act in vain.
- Causes of action needed are not set in a definitive list, and Human Rights Act 1998 does play a vital role
    - In ***Douglas v Hello*** it was said that English law would recognise and uphold the right to privacy and an action would be allowed for breach of confidence. Whilst no right to privacy there is a right to confidence and so a cause was permitted on the basis of such a right being breached
- Court can develop the legal rights and causes of action in such cases regarding injunction. They may be granted in new/novel situations

Locus Standi:

- Locus standi is the principle that an applicant cannot sue unless they have a right affected by the suit, and AG has locus standi to stand before the court in regard to matters affecting the public at large

Remedy in personum:

- As with all equitable remedies, an injunction will act in personum so it doesn’t act to change substantive rules of law but only against the conscience against whom it is awarded; question arises whether an injunction can be granted against a third party
    - Court, in reflection of in personum, wouldn’t usually have the right to do so
- In ***Venebles v Newsgroup Newspapers*** the human rights act played a role on the exercise of the courts discretion. Murderers went to court to prohibit publications of any information about them EVER through pleading a right to life under Article 2 of the ECHR. In order to protect such a right, a prohibitory injunction was granted against the whole world so as to make anyone in breach of the injunction liable for contempt of court

Contra Mundum:

- Contra Mundum refers to the idea that an injunction can be asserted against the whole world; anyone who has notice of the injunction and breaches it will be found to have acted in contempt of court

Interim injunctions:

Interim injunctions were formerly known as interlocutory injunctions and are awarded on an interim basis during litigation. The award is based on a balance of convenience between the potential harm suffered by the applicant if no injunction were awarded and

the potential inconvenience caused to the respondent if the injunction were to be awarded.

Refer to the prevention of the defendant acting prior to the full trial:

- They are binding on the parties only up to date of final judgment
- This is because sometimes before the conclusion of a trial the damage may have already been caused and sometimes due to the urgency of the matter it requires swifter action to prevent the harm being caused; this is where interim injunctions come into play
- The more common types of injunctions are known as perpetual injunctions whereby conjunctions are granted at the conclusion of the full trial hearing
- Fact they are granted at a preliminary hearing is usually so as to maintain the Status Quo to ensure the defendant doesn't violate any of the claimant's legal rights

This is a well used equitable remedy usually so as to make someone perform an action or to refrain them from carrying out an action. The court must uphold the mentioned remedy if it is provided for by statute, but on occasions the court will exercise their discretion:

- While equity will take priority over the common law, it must be established first and foremost that common law will not adequately dispose of the matter
- Prerequisite that no common law remedy would be sufficient in the circumstances

Interim injunction is one granted during the litigation and is binding on the parties until the decision so as to prevent the harm that can be caused in the mean time and wait until the final decision is made.

- ***Hoffman v Leroche*** defined the objective of interim injunctionsas preventing the litigant from losing from the delay the fruit of his suit
- During this time the order will work so as to prohibit someone so as to not allow the claimant to suffer a breach of their rights

Interim injunctions can be:

- **Prohibitory**
    - Prevent a defendant from doing something and therefore stopping a breach of their obligations
    - Granted so as to prevent the continuance or recurrence of a wrongful act
- **Mandatory**
    - Compels the defendant to take some action
    - Essentially reflecting specific performance as they overlap in the sense that both obligations seek to force the defendant to perform an action; specific performance refers to contractual obligations whereas injunctions have a broader scope

- **QuiaTimet (he who fears)**
    - An injunction which anticipates an action against the applicant in the future; hardest to obtain. Can be prohibitory or mandatory and are made when the harm hasn't yet happened but anticipated by the claimant or threatened by the defendant
    - The term itself means ''he who fears'', and by fears it is meant he fears suffering some harm
    - Works in two main ways:
        - Orders the defendant not to act in a manner in which he threatens or intends to cause harm to the claimant
        - Where the claimant has been fully compensated for earlier actions of the defendant, the defendant will still nevertheless be ordered to act in a manner to ensure it doesn't occur again

There are nevertheless particular problems to consider with the granting of interim injunctions:

- Court at interim stage will not have heard the full details of the case as there may not have been a full trial.
- To give an injunction to the applicant is to prohibit the defendant from acting in the way he would have done which would have been perceived to be negative
- Special considerations are borne in mind; better to grant an interim injunction so as to protect against the possible infringement against a person's right

What will the court take into account to decide if they are to grant an interim injunction?

- In ***JT Stratford& Son Ltd v Lindley*** the claimant had to show a strong prima facie case that their rights had to be infringed and that damages had to be inadequate during the full trial.
    - Must show at interim stage that you have a great chance of succeeding at the final stage
    - Such principles were replaced in the next case

In the case of ***American Cyanamid v Ethicon*** the starting point and guidance was set down as to how the court will exercise their discretion in the granting of interim injunctions

- Prior to this case the claimant needed to show a strong Prima Facie case that their rights had been infringed, that damages were inadequate and justice required the grant; an unnecessarily heavy burden to place on a claimant thus the only way a claimant could even get an interim injunction was to show that he would definitely receive an injunction at the conclusion of the trial.
- Revolved around the QuiaTimet injunction

- Respondents dominated the market for polymers used for stitches and the applicants patented another polymer
- In competition Ethicon introduced their own artificial polymer; in march an action was brought against Ethicon on the allegation that it compromised their patent
- After assessing all the information the judge in the patent court granted an injunction, however the court of appeal reversed this as the applicants didn't make a strong prima facie case.
- When refereed to the House of Lords, **Lord Diplock** disapproved of the approach taken to decide this question. At interim stages the law and fact aren't to be considered. House was unanimous that there was no rule that required the claimant to make out a strong prima facie case; such a rule would inhibit the courts discretion to provide a relief, and he **set out some criteria:**
    - **MUST NOT BE FIVOLOUS OR VEXATIOUS**
        - An order would only be considered if there was a serious issue at hand; in ***Morning Star v Express Newspapers*** a claim was brought forward suggesting readers would confuse two papers each with star at the end. The judge felt only a ''moron in a hurry'' would confuse the two and dismissed the claim as it wasnt deemed to be serious
    - **ADEQUACY OF DAMAGES**
        - Essentially asks if money would be enough to compensate the claimant in the situation
        - Considers whether the type of damage is irreparable or if damages are hard to assess
    - **BALANCE OF CONVENIENCE**
        - Balance of conveniences is the core test
        - Lord Diplock said it would be impossible to list the considerations
        - Each case turns on its own facts
        - By balance of convenience it is meant that the potential harm the applicant could suffer must be weighed up against the potential inconvenience caused to the respondent if the injunction was to be awarded
    - STATUS QUO
    - STRENGTH OF PARTIES' CASE
    - SPECIAL FACTORS
- Requirement to show a prima facie case will always be short of requiring the applicant to go as far as proving the entire case

- Court shouldn't impart on a mini trial and must be asked if it is a serious issue
- Balance of convenience/justice test was held to be the governing issue and the court should consider if damages can be an adequate remedy
- If the interim injunction isn't granted and ethicon launch their product given they have the bulk of the market and it is then found that cyanamid had a valid case, then there would essentially be lost opportunity for the applicants
- In such a case an injunction should be granted
- Adequacy of damages is a main issue according to Lord Diplock

- Felt justice would best be served by maintaining the status quo and thus leaving things as they are; if the person is asking for a QuiaTimet injunction then the maintenance of the status quo requires the grant of the injunction. For mandatory and prohibitory injunctions it means doing nothing. If on the balance of considerations everything is found to be equal then the court would maintain the status quo.
- In finding the balance of convenience Lord Diplock said it would be absurd laying out all the criteria to finding out where the balance lies and these will vary depending on cases on an individual basis; only as a last resort should the relevant strength of the parties be considered
- In addition to the above, Lord Diplock felt there were other special factors to be taken into consideration.
    - Judges look at striking this balance of convenience through a wide variety of considerations
- Decided to grant the injunction in this case, and in order for the court to consider the grant of an injunction carefully they follow Lord Diplock's guidelines

However, only 4 months prior to ***Cyanamid*** in the case of ***Hoffmann v Leroche***, Lord Diplock happily applied the old guidelines and didn't express any qualms

In ***Series 5 Software v Clarke*** the applicant manufactured computer software and defendants complained they were paid unfairly and so took computer tools with them so as to reimburse themselves. Company was worried as to the information they took being used in a manner which would compromise their customer database. Felt balance of justice must be carried out so as to reduce the harm; common sense considerations as to how balance could be carried out.

- Laddie J felt that Lord Diplock perhaps required the court to consider the comparative strengths of the parties cases without resolving any issues of fact or law
- Review needed of all evidence disclosed
- Evidence relating to adequacy of damages

- Lord Diplock's judgment nevertheless more superior

Exceptions to *Cyanamid*:

Whilst it is true that *Cyanamid* is a starting point, it is not suitable or indeed applicable to all situations

Trade union cases:

- The Trade Union and Labour Relations (consolidation) 1992 Act left no place for the balance of convenience; provides legal right to strike if the dispute is in contemplation of a furthering of a trade dispute and so court cannot stop them striking in such a situation

Where trial of the action is unlikely or delayed:

- ***Cayne v Global Natural*** demonstrated how the interim stage isn't going to be too relevant in the absence of consideration of the strength of the parties
- In ***Cambridge Nutrition v BBC*** it was said how *Cyanamid* shouldn't be taken as bringing into force strict rules. In this case a documentary was sought to be delayed until a government report was published. Argued the BBC had orally agreed to this postponement.
    - Felt this wasn't suitable for *Cyanamid* rules as it depended solely on grant or refusal of interim relief. Strength of parties in this case was important
    - Kerr LJ held that the principle is not one of universal application
    - Nevertheless it can be argued that due to the nature of the program in question being one of current affairs then to grant an interim injunction would essentially be the equivalent of a final injunction; to prevent transmission at the time would essentially mean it could never be shown. Still an element of a balance of considerations as it weighed up factors.

Where there is no arguable defence:

- Where there is an action for injunctive relief but the defendant had no defence then no need for *Cyanamid* approach

Libel:

- The law of Libel is another area where the *Cyanamid* guidelines will not apply as it is linked to freedom of expression; that which is sought to be expressed shouldn't be limited. Law aren't likely to infringe on a person's right to freedom of expression unless it is a lie. At interim stage the trend is not to award an injunction; ***Bonnard v Permian***
- Lord Denning in ***A-G v BBC*** said how all requests for gagging injunctions on matters of public interest should fail but nevertheless there are situations where they are granted as in ***Hubbard v Pitt*** where residents were restrained from picketing with libellous signs.

- Rule in ***Bonnard*** is still good law and was reiterated in the recent John Terry saga where any identification of Mr Terry and the woman were restricted

Section 12 Human Rights Act 1998:

- This section creates another exception to when the ***Cyanamid*** guidelines will not apply; predominantly focused on matters relating to freedom of expression as contained in Article 10 ECHR
    - If there is a serious matter concerning journalistic freedom and this is in the public interest, then it should be allowed to be published
    - In regard to freedom of expression, it comes into play when something is sought to be published but is felt to undermine another's right
- **Section 12(3)** states how ''no such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication shouldn't be allowed''
    - Unless you can establish that a right has been infringed then an action will not succeed in accordance with this section; distinct from ***Cyanamid*** in that the courts need to know the person claiming is likely to establish a breach of their rights
    - Raises questions if this likelihood is essentially the resurrection of the old prima facie requirement
- **Section 12(4)** states ''the court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to a) the extent to which the material has or is about to become available to the public, OR it is, or would be, in the public interest for the material to be published; b) any relevant privacy code.''
    - Must have special regard to freedom of expression and should have regard to the extent of availability of the publication; shouldn't be obstructed if the story is journalistic
    - Needs to assess if the publication would be in the public interest; a debateable topic but the court should nevertheless take into account whether it would be effective
    - In ***Douglas v Hello*** the claimants were not granted an injunction at first hearing but merely damages
- Section 12 has had a major impact on what the court should take into account; section 6 human rights act says it is unlawful for a public body to act incompatibly with convention rights and court is a public body under this obligation. Other sections of the human rights act lay out the need for legislation to be interpreted as far as is possible with human rights; if we can assert a right that has been infringed then the right must be interpreted in accordance with human rights

How does the court go about interpreting human rights?

- Need for a right to be found to have been infringed; technically a newspaper does not have to act in accordance with your human rights as it is not a public body. In these types of cases the most often type of right is the **tortuous duty of confidence** under privacy in Article 8; **misuse of private information**
    - Once this cause of action can be shown then the court is under a duty under section 6 to not act in an incompatible manner with that right

Tort of ‘’misuse of private information’’:

- Important case for breach of confidence protecting right to privacy is ***Campbell v MGN***
    - Naomi Campbell had pictures of her leaving a narcotic rehabilitation centre published alongside an article. She claimed a breach of confidence but newspaper claimed freedom of expression
    - Decision 3-2 found for Miss Campbell. Most of the judges agreed there was no cause of action for invasion of privacy (like in America). Problem with breach of confidence as a cause of action is that to show it you must firstly have a relationship of trust and confidence which has in fact been breached; any celebrity would have difficulty establishing this
    - House was happy to say that ‘’this cause of action (breach of confidence) has now firmly shaken off the limited constraint for the need of an initial relationship of trust and confidence and a time has now come that the values enshrined in Articles 8 and 10 of the convention are part of the cause of action for breach of confidence’’ Per Lord Nicholls. Therefore getting rid of the need for any prior relationship of trust and confidence; assimilating the rights contained in Article 8 with the common law right of breach of confidence.
    - Baroness Hale felt that it must firstly be shown that Article 8 had come into play an had been breached; claimant must have a reasonable expectation of privacy for example you wouldn’t have a reasonable expectation in a night club where you’ve had too many drinks and a picture pops up off you making out with someone. To decide if article 8 has come into play you must assess whether or not the person has an expectation of privacy; this is a question of fact for the judge in each case
    - If they do have a reasonable expectation and article 8 is engaged, it must then be balanced with the right to freedom of expression; is there valid reason as to the displacement of freedom of expression. Fact of Miss Campbell receiving the treatment may well be in the public interest, and one judge said that had it only been the story then freedom of expression would have prevailed but due to the photograph being published this went too far; she had reasonable expectation of receiving confidential medical treatment and she was a role model for many people and therefore should have remained private.

- This assimilates breach of confidence with Article 8 and tells us when the rights under Article 8 would arise as well as the need for balance.

- The case of ***Von Hannover v Germany*** was decided in the European Court of Human Rights and was regarding the Princess of Monaco. The court considered that the balancing of private life and freedom of expression lies in the publication of the photos to anything of general interest; showed Princess Caroline engaging in activities of daily life and recognised this was a breach of privacy.
    - The photos made no contribution to matters of public debate
    - Court once again talked about a person's reasonable expectations to matters in their private life remaining private
- The dictums from these cases appear in many of the consequent cases and framed the law as it is now
    - Support a right to privacy and these are on the side of a growth in regard to the right of privacy

Balancing with freedom of expression:

- House of Lords nevertheless understood that freedom of expression is vital. Injunction shouldn't be given unless an applicant is likely to establish it was a breach of their rights. What exactly is the threshold? It is set out in ***Cream Holdings v Banerjee***
    - Was in regard to a cream nightclub in Liverpool where a former employee alleged financial irregularities about the company and took confidential papers with her to show the editor of a paper. Company sought an interim injunction to prevent later publications about the company and sought to establish a breach of confidence by the defendant
    - It was argued that the publication of the papers was in the public interest and should be allowed. Court had to decide the test under section 12(3)
    - Court of appeal felt ''is likely to establish'' should be construed widely and should be taken to mean ''more probable than not'' and there should be a ''real prospect of success, convincingly established''
        - Court of appeal held that if it is more probable than not that they will win at full trial then the injunction should be given
    - In the House of Lords, Lord Nicholls said that 12(3) serves to make the likelihood of success at full trial an essential element and the court should be wary of granting an injunction.
        - Moved the threshold up to ''more likely than not'' as the court of appeals version rests more on a balance, and so the person must show they have a very strong case if they are to be granted an interim injunction. ''More likely than not'' is a higher threshold to cross than ''more probable than not.''

        - If you want the court to gag a newspaper a strong case is essential; stresses the message from 12(3) in that courts must have regard to the importance of freedom of expression. Section 12 is there to protect freedom of expression

- The reasoning of the House of Lords was applied in ***Unilever v Griffin*** whereby an injunction was sought to refrain the use of the marmite logo by the BNP. Court considered the interpretation of 12(3) from the previous case and Arnold J felt that ''the claimant must establish that they are to probably succeed at trial, but this rule is not inflexible but rather in appropriate circumstances a lower degree of likelihood will suffice''

    - The court is essentially saying that the threshold (more likely than not) is there, but it is applied flexibly and in some circumstances a lower threshold will be alright

- In ***Terry v Persons Unknown*** John Terry argued a breach of confidence and misuse of his private information, the court was mindful (in regard to continuing the injunction) that he proved true many of the alleged actions and that injunctions act in personum. In rejecting his application, at the trial on misuse of private information the court said he must establish he had reasonable expectation for the court to not disclose his matters

    - In relation to misuse of private information there is a conflict between Articles 8 and 10 (and neither had priority over the other) therefore the courts had to carry out a balancing exercise

    - Terry, through the courts balancing, and his issues were found to be in the public interest and had the repercussions that people had the choice to live freely. The freedom to live as one chose was valuable but so is the freedom to criticise; socially harmful or wrong.

    - Essentially felt that while his right to live as he likes may be private in nature; with the right to act as you choose goes with the responsibility that you have to be alert as to others rights in regard to your conduct.

Multiplicity of tasks needed to be carried out by the court:

- Libel and privacy are different rights; they protect different rights

- Remains a strong justification of maintaining the decision from ***Bonnard v Perriman*** in that publications are not likely to injunct libellous statements as the compensation one can receive can go a long way in restoring a person's role in society.

Ex parte orders

Ex parte orders are essentially remedies which can be sought in the absence of the defendant; raises issues in regard to Article 6 of the ECHR regarding a right to a fair trial as the defendant is not there to present their case. Nevertheless, despite the absence of the defendant the circumstances may be such whereby for the parties interests to be upheld an ex parte application would be permitted

Search orders:

- Formerly called ‘’Anton Piller’’ orders
    - In the case of ***Anton PillerKG*** Ormrod LJ said that this remedy was one of ‘’last resort’’
- Sometimes a party may be required to disclose documents of relevance to the trial however where it is felt that the other party will not do so then a search order would be asked for; they are granted without notice to the defendant and they require the defendant to allow a search of their premises to locate the documents
- For an order to be granted:
    - Must have a very strong Prima Facie case
    - Must be able to show actual or potential damage of serious nature
    - Evidence that documents etc do indeed exist and that there is a risk of their destruction
- Court conducts a balancing exercise so as to protect the interests of both parties
    - In ***Lock International v Beswick*** it was shown how the defendant can make an application to as to have the order removed or varied
    - **Section 7 of the Civil Procedure Act 1997** set out procedural safeguards such as a supervising solicitor, the search taking place in office hours, the defendant or a responsible employee must be present and only the subject matter of the order can be taken

Freezing orders: Formerly known as ‘’Mareva’’ injunctions

- In the case of ***MarevavInternationalBulkcarriers*** it was shown that an effective use of the order will freeze the assets of the defendant up to the value of the claim and will prevent a defendant from removing their assets from the court’s jurisdiction before trial

- These are essentially mandatory orders which freeze the assets of the defendant; should a claimant win at trial then they want to ensure that the damages they are entitled to are able to be paid. This so as to reinforce the idea that equity doesn’t act in vain
- Lord Denning said in *Z v AZ and AALL* that this remedy was proprietary in nature. In ***Derby v Weldon*** it was shown how there must be a good and solid case for such an order to be granted and it was also said how in order for a freezing order to be utilised it must be shown that there is:
    - Good arguable case
    - Real risk that judgment will go unsatisfied: without the order assets will be removed
    - It is just and convenient in all the circumstances

INTRODUCTION TO TRUSTS

Taken simply, a trust enables more than one person to have rights in the same property simultaneously. A trust permits a division in the ownership of the trust property between a trustee and beneficiary so that the trustee is compelled to act entirely in the best interests of the beneficiary in relation to the management of whatever property is held on trust.

A legal trust ownership is divided between two individuals that are called trustee and beneficiary.

The role of management is vested in a person called a trustee. The trustees (hold legal titles) have agreed to hold and manage the legal title for the benefit of beneficiaries and their conscience binds them in equity.

The enjoyment of the thing subject to the trust is vested in persons called beneficiaries (equitable titles), thereby giving the beneficiaries an equitable interest in the property subject to the trust.

- Panesar defines a trust as:
- " an equitable obligation, binding on a person (who is called trustee) to deal with property over which he has control (which is called the trust property), for the benefit of person (who are called beneficiaries), of whom he may himself be one, and any one of who may enforce the obligation. Any act or neglect on the part of the trustee which is not authorized or excused by the terms of the trust instrument, or by law, is called a breach of trust".
- Maitland suggested that the definition of a trust was:
    - ''When a person has rights which he is bound to exercise upon behalf of another or for the accomplishment of some particular purpose, he is said to have those rights in trust for that other or for that purpose and he is called a trustee.''
- To Sir Arthur Underhill:
    - ''A trust is an equitable obligation binding upon a person (who is called a trustee) to deal with property over which he has control (which is called the trust property) for the benefit of persons (who are called beneficiaries) of whom he may himself be one, and any one of whom may enforce the obligation.''
- Lord Justice Millett stated:
    - ''A trust exists whenever the legal title is in one party and the equitable title in another. The legal owner is said to hold the property in trust for the equitable owner.''
- Tomas and Hudson define a trust as:
    - An ''imposition of an equitable obligation on a person who is the legal owner of a property (a trustee) which requires that person to act in good conscience when dealing with that property in favour of any person (the

beneficiary) who has a beneficial interest recognised by equity in the property.''

- Essentially the trustee is said to ''hold the property on trust'' for the beneficiary

- A trust permits a division in the ownership of the trust property between a trustee and a beneficiary so that a trustee is obliged to act in the best interests of the beneficiary in relation to the management of whatever property is held on trust

    - Essentially a trust is concerned with the utilisation and preservation of wealth

It can be deduced from the various definitions offered above, that there are in fact two fundamental features of the trust:

1) A person holds property rights for a person or purpose – the property component; and

2) That person is obliged in equity to exercise those rights for that person or purpose – the obligation component

<u>Development of the concept</u>

Nowadays the doctrine of trusts is different from its initial inception and is used commonly in commerce and is a tool in holding and managing property.

- Trust originated from medieval practice called ''the use''; effect of a transfer was that third parties became owners of the property in law but for the benefit or use of somebody else. This idea of ''split ownership'' emerged whereby the person who went away on crusades was regarded as the owner of land in equity whilst the person looking after the land was treated as being the owner of the land by the common law courts

- If the person going away (settlor) transfers land to another party (trustee) but does so for the use and benefit of somebody else (beneficiary). The trustee receives the property knowing that they cannot do what they want for it; issue of conscionability comes into play. This device arose so as to bypass the feudal laws that would have otherwise taken property away from the settler.

- Much of the development has been in the tying up of family wealth

- They can even allow a settler to allow secretly for an illegitimate child to be provided for

Revolves around notion of settling property on trustees:

- Assets can be held by trustees to protect and for the benefit of minors; settlor or trustee can look after the property for the beneficiary in cases where the beneficiary isn't capable of doing so for themselves; diverse ways in which it can be used

Trust is a creature of equity as opposed to the common law; before the judicature acts, the chancellor's decision was unclear but nevertheless he would step in where it would be

unconscionable to otherwise allow a person to rely on his legal rights. Trustee may have legal title but the beneficiaries have the equitable interest in the property

- Issues arise whereby the trustee attempts to utilise the property in a manner to his own liking, at this point equity will step in where it would be unconscionable to allow the trustee to use the fact he has legal title to the disadvantage of the beneficiary
- Equity will not allow the trustee to go back on their word where it affects their conscience
- Even though the rights of enforcement would be given in personum by the chancellor, he would enforce it against any other person who moves to take the land away from the beneficiary whose right is in the property.
- Beneficiary has a right in wren; meaning the right is in the property as opposed to merely against an individual. If you are a beneficiary under a trust, your right is immense in terms of the property in that it persists against anyone who seeks to take the property, except ‘’equity’s darling’’ who is a person who takes trust property without any notice that there were any beneficiaries involved. As a beneficiary your right will not persist against the darling but will against anybody else.
    - In ***Armitage v Nurse*** it was expressed how a trust cannot be held to exist if the beneficiaries have no enforceable rights against the trustees
- If the land was vested in someone else then this would circumvent the historical notion of land reverting back to the crown

The Statute of Uses 1535:

- Henry 8th tried to use a statute of uses in 1535 to circumvent this doctrine but this was of little effect

The Tenures Abolition Act 1660 and the nature of equitable rights:

- At some point during development of the use the right became a right in rem (proprietary right/interest in the property itself)
    - In Rem means against the thing; available against the world at large
    - This equitable right can be characterised as a proprietary right against a particular asset; holder of the right will be able to exclude anyone in the world from making use of the asset in which they have the right
- Rights in personum, meaning against the person
    - Maitland characterised the beneficiary’s equitable rights as being personal rights against the trustee rather than property rights against a thing
- Before the creation of a trust a settlor owns absolute title and once he validly declares a trust the legal title is transferred to trustees (settlor/absolute owner can nevertheless declare himself a trustee)

- At the moment of the constitution of the trust the settlor loses all their rights to the property
- Trust is obligatory in nature; when a person receives property on trust they do not have any choice as to whether or not to fulfil the intentions of the settlor as they have to do what the settlor asked or intended them to do. The settlor is a creator of the trust and decides on the form and players involved in the trust.
    - Once the trust is created the settlor in their capacity loses control of the trust property, such as in ***Re Bowden*** but before joining the convent she transferred property over to trustees to distribute amongst certain beneficiaries. Even when she later tried to go back on this trust she could not as she had surrendered her rights. The trustee is mandatorily obliged to hold property for the beneficiary
    - Trustees must always act in the interest of the beneficiaries; strict rules as to how trustees look after and manage trusts and be held to account if there has been a misuse or breach of trust
    - Beneficiaries, under the rule in ***Saunders*** whereby they must be of sound age and mind, can tell the trustees to terminate the trust and transfer the property over to them
- Anything capable of being transferred is capable of being trust material

The case of ***Re Bowden*** made it clear that the trust is a triangular relationship between the **settler** (absolute owner of the LEGAL AND EQUITABLE TITLE), **the trustee** (legal title only) and the **beneficiary** (who has equitable title only)

The trust in comparison with other legal concepts

- Debt cannot be subject to a trust
- Main distinction is between who can enforce a contract of trust; old rules of privity (now set aside) are in contrast to a trust as a beneficiary has always been able to enforce the trust obligations
- Key difference is the right to enforcement. Under a contract you only have a right to sue a person whereas as a beneficiary as long as the property is there you are able to follow through and obtain it
- In terms of a debt, the trust is of particular objects as opposed to the subject matter per se. if the trust is validly created the objective is to give
- As a beneficiary you are in a much better position than any other type of creditor, such as in ***Re Kayford*** money was held not to form part of the company's general assets as it was paid by people into a trust account

How does a trust come into existence?

- Either by virtue of having been established expressly by a person (the settlor) who was the absolute owner of property before a trust was created. Or by an action of the settlor which the court interprets to have been sufficient to create a trust but which the settlor himself did not know was a trust

- Lord Browne-Wilkinson in ***WestdeutscheLandesbank v Islington LBC*** stated how the relevant principles of trust law are:

    1) It operates on the conscience of the legal owner, whose conscience requires them to carry out the purpose for which the property was vested in them in the first place, or which the law imposes on his due to their unconscionable conduct

    2) A person cannot be a trustee of the property if they are ignorant of the facts alleged to affect his conscience

    3) There must be identifiable trust property in order for a trust to be established

    4) From the date of the establishment of a trust the beneficiary has a proprietary interest in the trust property which will equitably be enforceable against any subsequent holder of the property

Distinguishing Trusts and Powers

Settlor:

- The person who owns the property absolutely from the beginning. If they give their money to a person and say they shall use it for a specific benefit (imperative instruction), the person is therefore made a trustee under law
- Initially the absolute owner of property and can settle the property on another person to look after it for the benefit of someone else
- A settlor can be described as holding absolute title in the property which is to be settled on trust.
- Once a trust has been declared the settlor ceases to have any active role in the trust

Trustee:

- On creation of a trust the legal title in the trust property must be vested in the trustee and held by him on trust for the **beneficiaries stated**
- On receiving property on an imperative direction, a trustee will not be allowed to act with the property on her own conscience; knows property must be looked after for somebody else means she has become a trustee due to her conscience becoming affected
- They are the ‘’legal owners’’ of the property; in terms of all the common law rights being vested in them
- Trustees however are not allowed to assert personal, beneficial ownership in the trust property
- Conscience is affected by direction on how to utilise subject matter

- A trustee is **obliged** to fulfil the directions of the settlor in dealing with the trust subject matter as if he does not then he would be committing a breach of trust
- **THIS IS A TRUST**

Donee:

- If something is given alongside the power to utilise it in a specific manner, but not definitive instructions, then this will mean a person is deemed a Donee
- If property is given without an imperative instruction (eg you give someone £1000 so that they MAY distribute money to your children) this means the person is not compelled to act in that manner; making them a Donee
- Trustee merely has the power to do something with the asset
- Refers to a personal relationship; one is **authorised** to hold the money and are objects of the power which is of a personal nature
- Objects under a power as opposed to specific person/group
- **THIS IS A MERE/PERSONAL POWER**

Fiduciary/Trustee:

- Fiduciary relationship is one where there is a relationship of trust and confidence (eg doctor and solicitor) and there is an expectation that the trustee would only act in the best interest of the client (the settlor)
- Millet LJ in ***Bristol & West Building v Mothew*** described a fiduciary as someone who has ‘’undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence’’
    - Essentially a fiduciary must act in good faith and not profit out of his trust
    - Must not act for his own benefit or that of a third person without the informed consent of his principal
- Where a trustee has fiduciary power to distribute trust property to the objects they aren’t obliged to exercise such a power but need only consider exercising it
    - Still a power as it is the authorising of the object to hold the property
    - Creation of a fiduciary/trust power
- The nature and expectation of power is different to that between a settlor and donee, and the law will regulate such a distribution
- A fiduciary is one who owes legal duties of loyalty and utmost good faith in relation to another person
- **THIS IS A FIDUCIARY/TRUST POWER**

Therefore it can clearly be shown how trusts are **imperative** whilst powers are **discretionary**:

- Trustees are subject to statutory and common law duties and can be held personally liable if they fail to deal with the trust in the envisaged way
- A power is authoritative in nature and more discretionary; court will never step in to compel a person with a power to act or do certain things
    - By a power it is meant that a range of abilities and capacities set out in the terms of the trust possibly to exercise their discretion between certain classes of beneficiaries and so forth
    - Powers refer to the ability to perform some action in the sense that the right holder has a discretion
    - A power creates a right but no obligation to perform a given act whereas a trust imposes an obligation
- Even where the obligation is imperative the trustee may have discretion
    - Powers are clearly discretionary in nature but trusts are also capable of being discretionary
- Sometimes property may be given with a power to decide who will get it; persons who may receive properties under the power by contrast to a beneficiary to a trust, an object to a power owes nothing until a Donee of a power exercises such
    - If you are an object under a personal power you have no right in the property and the courts will not interfere
    - However different rights will be exercised in relation to trust powers
- Depending on the construction of the language of the instrument that is the means of differentiating between a trust or a power being in existence
    - Court will interfere in a trust
    - Court will not interfere in a personal power
    - Court may interfere in relation to a fiduciary power
- If instrument does not dispose of all the property, the fact there is some envisaging by the settlor as being left over is indicative of it being a power

In ***Brown v Higgs*** it was stated how ‘’There are not only a mere trust and a mere power, but there is also known to this court a power, which the party to whom it is given, is entrusted and required to execute; and with regard to that species of power, the court considers it as partaking so much of the nature and qualities of a trust, that if the person who has that duty imposed on him, does not discharge it, the court will, to a certain extent, discharge the duty in his place.’’

- Was in regard to fiduciary powers
- In such instances of power the court may intervene to ensure it is being administered correctly
- Language is key

In the case of ***Burrough v Philcox*** it was said that ‘’to dispose of all my real and personal estates among my nephews and nieces, or their children, either all to one of them or to as many of them as my surviving child shall think proper.’’

- Essentially, any remainder left to the children should go to their children upon their death and in the event of there being no children and money being left over then the last remaining child has the power to dispose the wealth to the nieces and nephews
- Question was whether the words in the will created a power
- It was held that where there appears a general intention in favour of a class to be selected by another person and the particular intention fails, then court will carry out a general intention in favour of that class
- By looking at the words the court deduced that in the absence of any grandchildren then the nieces and nephews should inherit

In ***Re Weekes’ Settlement*** the settler said ‘’I give to my husband power to dispose of such property by will amongst our children.’’

- Property was transferred to a husband for his life with the power to dispose of the property by will amongst their children. Husband died without a will and without exercising the right so as to help the children
- Husband was held to be an object
- Held that it was a mere power conferred upon the husband and the judge said he saw no words by which it could have been intended that the children should take the property if the husband did not execute his option
- Property was held on resulting trust for the heirs of her side of the family

Question of powers and those given to fiduciary relationship was the matter of concern in ***Re Hay’s Settlement Trusts*** where questions arose as to how the court should supervise the exercise of such a wide discretionary power

- Could anyone keep a check on the power? What were the limits?
- It was held that the court would not compel a trustee to exercise a power but the trustee must at least periodically consider whether or not to exercise the power
- The fiduciary power is immediately different to a personal one in the sense that a court cannot compel the players in such a relationship but can tell them to not sit idly by and do nothing
- A fiduciary player must at least from time to time consider exercising such power. A Donee need not even think about exercising it but this is not the case with a fiduciary where they cannot ignore the fact they have the property and who can benefit from it
- Where the objects are discretionary then they must consider which persons or classes of persons

- **Three types of powers:**
    - **General:** powers exercisable in favour of anyone
    - **Special:** exercisable in favour of anyone falling within a defined class
    - **Intermediate/hybrid:** can be exercised in favour of anyone at all except those expressly excluded by their membership of a defined class.
- This case explores fiduciary powers

Classification of Trusts

Express trusts:

- As the name suggests is a trust a person intends to create
- Such trusts are those declared intentionally by the Settlor to settle specific property on trust for clearly identifiable beneficiaries. These trusts are held by a trustee appointed by the settlor to act in accordance to the terms set out by him
- Necessary that the trust property is sufficiently identifiable and is certain as to the identity of the beneficiaries. And the legal title in the trust property must be transferred to the trustees before the trust can be held to be effective
- **Can either be public (Charitable) or private trusts**
    - Public is a charitable trust not made for the benefit of private individuals. Those who benefit under this do not have the same rights as those who can in a private trust. Enforced by the Attorney General on behalf of the public.
    - A private trust is one that seeks to provide for private persons such as members of family, friends or other class of beneficiaries closely connected with the settlor.
    - If you are the beneficiary of a private trust however then equity will enforce it for you

Implied trusts

- Are trusts that the law in certain circumstances imputes or implies. They come in two forms resulting trusts and constructive trusts.

Resulting trusts:

- When a purpose laid out in the trust is finished, then the law will say that the property results back to whence it came
- Such trusts are essentially implied by the courts and arent created intentionally by the settlor

Constructive trusts:

- A trust constructed by the court and is essentially the opposite of an express trust; arises through the operation of the law

- Where the defendant has acted unconscionably the court will hold the defendant to be a constructive trustee
    - In the event of unconscionable receipt of property, the defendant will be regarded as holding that property on a constructive trust for the person deemed to be entitled to the property in terms of equity
- Person may be entitled to property but may not have been aware of this fact through the courts construction of a trust; not intentionally or expressly made

Fixed trusts:

- A fixed trust is one where the beneficial interests of the beneficiaries is fixed.
- For example, a settlor may transfer $20,000 on trust for his three children equally. The beneficiaries are entitled to one-third of the money. The trustees have no discretion in the manner in which the money is distributed to the children.

Discretionary trusts:

- In a discretionary trust, the trustees are given a discretion in the manner in which the trust property is distributed. For instance, the trust may be in favour of the children of the settlor or it may be created in favour of a class of persons. In such trust, the trustees have to power to distribute, however they want to distribute and to whomever of the beneficiaries left at their discretion.

THE CREATION OF AN EXPRESS PRIVATE TRUST

Express Trusts arise from the express intention of the party who creates the trust:

- Fundamental idea is that judges will try to uphold a trust if they are in a position whereby they can; the settlor/testator's intention to create a trust should be respected
- It is crucial to the formation of an express trust that the settlor acts with certainty

This area will focus on the role of the settler or testator in creating a trust. Creating a trust has very significant consequences, imposing duties on the trustees and giving beneficiaries important proprietary and personal rights. The wishes of the settler must be clear, the trust property must be readily identifiable, and the beneficiaries must be identified. These requirements are known as the three certainties, following the classification afforded to them by Lord Langdale in ***Knight v Knight***

Personal liability if you breach your obligations under a trust. Must be clear (in cases of express trusts) that the settler intended to create the trust.

- **To find the intention of the settler:**
    - Must be certainty as to what the settler intended to create
    - Subject matter of the trust must be clear and identifiable
    - Certainty of beneficiaries as to who is going to benefit under the trust and this must again be clear and identifiable
- *Knight v Knight* conveyed how a trust would be created if the words used were ought to be construed as imperative
    - Need to look for property
    - Who the intended beneficiaries are

THE THREE CERTAINTIES

1)Certainty of Words/Intention

An intention will be valid only if the settlor or testator had the capacity to create a trust

Intention of a settler to create a trust is essential to finding out if a trust has indeed been created. From the language used in the trust instrument we have to decide what the person would have intended. More difficult cases revolve around where the person deals in ignorance of their rights

- In the case of ***Paul v Constance*** (Mr. Constance was initially married with Mrs. Constance, but left her years ago and lived with Mrs.Paul. He opened a joint account under his name. After he died, Mrs. Paul was not able to retrieved the money from the bank. In this case the judge words were held to have validly created an express trust even though the speaker of these words had no idea that this is what he was doing

Equity looks to the intent rather than the form; no particular form of words required for the creation of a trust. The fundamental question boils down to whether the transferee of certain property is entitled to use the property beneficially for himself or are they conscionably bound to hold it for somebody else

- Given the fact that no particular form of words are to be used, the court will consider the intentions of the relevant parties' and will find a trust is that satisfies the intentions of the parties; must be certain that the settlor did indeed intend to create a trust as opposed to a mere moral obligation to make a gift

- If you have received it with an imperative instruction and your conscience is bound you are a trustee

Recipient of the property must be clear as to whether they can have the property for themselves or if they are obliged to hold it for another

- Must act selflessly in the interests of the identified beneficiaries

Court will scrutinise the words of the settler

- Before executors act 1830 the courts took the approach that in the event of precatory language and there was any property left over, the executor of the will got to keep any property not mentioned. Court would nearly always find a trust to exist especially in cases of children or relatives. Arguably a policy move by the courts to ensure money stayed in the family

- This rule was abolished following 1830 and words are not strained to find imperative language and such language is now taken at face value; need to look at instrument as a whole to find out what was intended

When a trust instrument or will has been written then the words must be looked at so as to ascertain the intention of the settlor or testator

- Sometimes a trust and its obligations compel a person to hold the property on behalf of another; words can infer such an intention by the testator

- Historically however clear and imperative language arent always used; court has to derive from the wording the intention of the settlor and prior to the Settlors act of 1830 when such precarious language is used the courts are minded to construe such language used as imperative

    - However post 1830, such words are taken at face value; demonstrating need to differentiate between imperative language which creates a trust and authoritative language which create a power, and finally language which can imply it was intended to be given to the trustee outright

- ***Paul v Constance*** revolved around the facts of a monetary award being received and upon receipt it was intended to be put into a joint account, however due to lack of marriage between lovers it was said that the money should be deposited under Mr Constance's name. On numerous occasions though he had said that the money ''was as much yours as it is mine'' and upon his death and a lack of a will Mrs Constance (his ''widow'' but not his lover'') tried to claim the money

    - Arguing that trusts governed the money deposited into the account

- Held that through his words and deeds 50% of the money was held to have been held on the basis of a trust and this was done through an express basis; court had to be convinced that Mr Constance intended for his actions to amount to a trust being formed
- By using the phrase on several occasions he had declared himself to be a trustee of that money
- Court looked at what had been said and done and whether or not there was an intention for his words to amount to a trust formation
- Court held that Constance had declared a trust over the money in the bank account and his words inferred that his intention had been to hold the property on trust for him and his lover. The couple had also treated and used the money in their joint endeavours; demonstrates how surrounding evidence will be taken into consideration to determine intention of the settlor
- Even if the parties are not aware of the entailment of a ‘’trust” or its meaning, they will be regarded as having made a trust if that is what the courts consider their intentions to indicate
    - On the other hand, simply because the word ‘’trust” is not expressly used doesn’t mean that the court will find the parties to have created a trust if their actual intention was to do something very different
- Scarman LJ felt that Constance’s words conveyed a declaration that the fund was the plaintiffs as much as it was his own
- Through money being utilised for joint holidays the court held that there was sufficient indication of the money being held on a trust basis

- In ***Re Kayford*** the court held that the company (who put money of their customers into a distinct bank account) had the intention of creating a trust over the payments. Once again an express trust was uncovered from the actions of the parties without a conscious intention to create an express trust
- However court will not always be willing to find a trust in situations of broad wordings and statements and in ***Jones v Lock*** where a man was scolded for not bringing his son a gift. However he later died a few days after giving a cheque to his infant son and later holding it.
    - Court initially held he had made an express trust but the court of appeal later held there was no gift or valid trust being formed through his actions. There was nothing to indicate an intention to create a trust of the cheque
    - Through examining the surrounding circumstances the courts can deduce whether or not there is sufficient intention to create a trust
    - Jessel MR defended the rationale from the above case in ***Richards v Delbridge*** by vocalising his opinion that in the advent of any failed transfer, if such a failed transfer was intended to take effect then the ‘’court will not hold the intended transfer to operate as a declaration of a trust for

then every imperfect instrument would be made effectual by being converted into a perfect trust.''

- Shows how the courts only look at what has been said and done by the settlor/ testator in order to deduce his intention and whether or not they are sufficient to indicate his intention; loose talk will not easily create a trust

In regard to precatory words:

- Whether or not there was the necessary intention to create a trust is a question of fact that depends upon careful construction of the trust document or will
    - Key test is to consider whether the creator of the trust wanted somebody to hold property for the benefit of another person so that he or she is under a duty to do so
- Precatory language began to be interpreted more strictly
    - Words like ''desire'', ''wishes'', ''requests'' or is ''confident'' as to the actions of the testator demonstrate a lack of the necessary element of requiring the other party to do something and therefore will not amount to a sufficiently certain intent to create a trust
- Court needs to look at the substance of the creator's intent to determine whether he or she wished to impose an obligation on the other party to hold property for somebody else or was simply requesting that he or she do so

As for certainty of intention:

- Whether a trust was intended is to be assessed objectively rather than subjectively by reference to the terms of any agreement or the relationship between the parties, as said in ***Pearson v Lehman Brothers***; concerned with what the reasonable person would conclude that the creator of the trust intended.
- In ***Lambe v Eames*** the testator gave land with the instructions that it is at her disposal in any way she think best for her family etc, but upon her death left property outside the realms of her family. Question was whether the right was inferred upon her to do with as she pleased in such a manner
    - ''at her disposal in any way she may think best''
    - If this was a gift she could do as she willed
    - However if this was an imperative instruction/obligation then leaving it to somebody outside of the family would not be allowed and therefore it is important to decide what the words meant
    - It was held that the money was an absolute gift as opposed to a trust; court acknowledged that prior to 1830 this would be a trust but now the will would be construed on the testators actual intention
- In ***Re Adams*** the testator gave his estate to his wife that she will do what is right between her children either in her lifetime or by her will after she is deceased. Question was whether this disposition was a gift or a trust; held to amount to a gift

- ‘’in full confidence that she will do what is right’’
- Mention of the gift may have imposed a moral obligation but not a legal one. The property was held to have passed to her absolutely
- Held that the property amounted to an absolute gift and did not impose a legal obligation for her to hold the property on trust for her children
- The statement by the testator was held to only have added a moral obligation to use the property in a way to benefit her children, however this did not place her under an obligation
- Court did note however that the testators confidence in his donee might suggest a trust in some cases but on a proper construction of the will it was held to not do so
- Court took the view that they should examine the true intention of the testator
- Where a statement is held to be a mere statement of wishes it will not have the force of a trust

- ***Cominskey v Bowring Hanbury*** concerned a direction that his estate and all property acquired by his wife, shall upon her death be equally divided amongst his nieces
  - ‘’in full confidence at her death she will devise it to all property under my will shall at her death be equally divided.’’
  - Starts off by giving her everything absolutely in full confidence but later says that if she does not do as she pleases then certain obligations must be fulfilled; had benefit of property during her lifetime but upon her death the property was held on trust for nieces
    - Held that there was an executory gift over the whole of the testator’s property which was intended to give the nieces some rights in that property under a trust
  - Majority held that a trust had been created as the widow had use in her lifetime but on her death the capital had to pass to her nieces. The court found that the testator’s intention was to give the nieces property rights from the moment that the will came into effect
    - The wife was subject to the obligations of a trustee and the property she held was based on a trust for her life whilst the remainder was to be given to her nieces equally
    - Objectively deduced that the testator intended to provide an ‘’executory’’ gift over of the property at her death to such as her nieces as to survive her

A Donee will take the benefit of the property where there is no trust obligation. The lack of such an obligation on their science recognises the property as being of a gift nature

In regards to identifying the certainty of intention through interpreting wills, Lindley LJ in ***Re Hamilton*** said how the court should take the will and upon doing so will ''have to construe and see what it means and if you don't come to the conclusion that no trust was intended you say so.''

- Essentially stressing the fundamental idea that one must actually look at the will and decide if there is sufficient intention to create a trust

There will be a resulting trust back to the settlor's estate in the absence of express wordings indicating the intention of the testator

Megarry J said in the case of *Re Kayford*:

- ''There is no doubt about the so-called ''three certainties'' of a trust. The subject matter to be held on trust is clear, and so are the beneficial interests therein, as well as the beneficiaries. As for the requisite certainty of words, it is well settled that a trust can be created without using the words ''trust'' or ''confidence'' or the like; the question is whether in substance a sufficient intention to create a trust has been manifested.''

2)Certainty of Subject Matter

A trust can be declared over a wide range of property, and as ***Swift v Dairywise Farms*** showed it can even be the case that milk quotas can suffice as subject matter!

Not only must the settlor show an intention to create a trust but he must then show an intention to create a trust over a specified property. The trust fund must be identifiable and property in which it is impossible to identify precisely which property is on trust will be deemed as invalid

- A declaration of a trust can only be deemed as valid if the subject matter of the trust has been described with a sufficient degree of clarity
- Certainty of subject matter essentially reinforces the idea that the property intended to amount to a trust fund is segregated from all other property so that it is sufficiently certain; if not then it will fail
- The intended subject matter must be segregated from all other property so that its identity is sufficiently certain; an intention must be found to create a trust over specified property
- Generally a failure to segregate the intended trust property from the other property will lead to a trust to be declared void

Subject matter of the trust can take many forms; regardless however it must fulfil the criteria of specificity as to enable the court to identify it. Uncertainty of the identity of the subject matter will leave it to not be regarded as a trust

- The property must be identifiable as if it is not the trust will be void for uncertainty
- Evidential uncertainty will not kill the trust

- However if the trust was for a ‘’special’’ property there would be no way to deduce which property he is referring to and so the trust would fail for uncertainty of subject matter

Language must be clear as said in ***Palmer v Simmonds*** as it is conceptually and linguistically uncertain. Such an uncertainty can on occasions cause the entire trust to fail.

- ‘’bulk of my estate’’ was held to be too uncertain due to the vagueness surrounding the term
- However, in ***Re Last*** the term ‘’anything that is left’’ was held to be sufficiently certain when taken in context
    - It appeared the testator left the estate to her brother absolutely but the provision as to anything left was taken to mean that he had a life interest in the estate with the left over’s upon his death passing to the other people.

In ***Boyce v Boyce*** a testator left 2 houses on trust for his two daughters and directed that the eldest daughter should have the first pick however the eldest died before her father and could not pick her house; question was whether the trust was still valid

- Would be impossible to deduce which house the eldest daughter would have picked
- Whilst there may not be an uncertainty per se as to the subject matter, due to impossibility of finding out which house would have been picked it was held that the trust would still fail for uncertainty
- In such a case the property would revert back to the estate of the settlor

In such cases where the property itself is shrouded in uncertainty there will be no trust and therefore any sought trust would fail

- Always should be looked at for ways in which the trust can be saved as there are always ways/means in which the subject matter can be saved
- The case of ***Re Golay’s Will Trysts*** shows how the courts have avoided the failure of enforceability of the subject matter and this can be done through an objection assertion
    - ‘’I direct my executors to let Tossy – Mrs F Bridgewater – to enjoy one of my flats during her lifetime and to receive a reasonable income from my other properties; she is, if she so wish, to wear any of my jewellery, car, etc., until her death. Nothing to be distracted, given or loaned to any of her relations or friends, money or goods.’’
    - The directions were found to be certain despite on the material facts being seen as vague and general
    - Court felt that the trustees were in a position to select the subject matter stated due to the previous standard of living by the testator

- A provision was held to be valid as long as an objective measurement was capable of being made and leading to a reasonable income in a respective case
- Case marks a shift in the cases and shows how the court will try its best to fulfil the testator's intentions in the event of their death
- A ''reasonable income'' was held to be sufficiently certain
    - It was felt that it was considered to be possible for executors to determine what is objectively considered to be ''reasonable''
    - Ungoed-Thomas J said ''the court is constantly involved in making such objective assessments of what is reasonable and it is not to be deterred from doing so because subjective influences can never be wholly excluded. In my view the testator intended by ''reasonable income'' the yardstick which the court could and would apply in quantifying the amount so that the direction in the will is not in my view defeated by uncertainty.''

Problems with certainty of subject matter are further aggravated where the property forms part of a broader bulk; how can it be ascertained which property is being referred to?Essentially the purpose of rules as to certainty of subject matter are to ensure the trustees know over which property the trust takes effect.

- The case of ***Re London Wine*** revolved around wine investments and customers received certificates as to the wine they had bought but not the actual wine; creditors claimed that the respective contracts should grant them a proprietary right to the wine held in the cellars
    - If it could be shown that the company was merely a trustee of the wine and the creditors were beneficiaries of the wine, then their interest could be expressed in proprietary terms. Such a claim could be pursued if the creditors could be shown that particular wines had been segregated from the bulk of the stock. If they could be identified then they could be held on trust for the creditor
    - It was held by Oliver J that creditors would only be entitled to assert proprietary claims as beneficiaries if each creditor could demonstrate the particular, identifiable bottles of wine had been segregated from the general stock held in the cellar and held separately to their account
        - If the wine had not been segregated in such a manner then there would be no proprietary rights over any wine held in the cellar
        - Oliver J expressed how ''to create a trust it must be possible to ascertain with certainty not only what the interest of the beneficiary is to be but to what property it is to attach.''
        - Due to lack of segregation there was no trust
        - This approach called ''orthodox approach''

- if your property is part of a homogenous bulk and it could not be identified as being of your proprietary interests then no trust would be held to exist

- In ***Re Goldcorp*** the company acted for clients so as to acquire gold and acted as a depository for the gold so as to have the effect that investors did not have tangible access to the gold
    - Could be subject to a trust as the property could be separately identified as their property
    - If it could be identified as unique, only in such cases could it be held to amount to a trust
    - Case upheld and reaffirmed the principle that property must be separately identified before it can be held on a valid trust
- There is a potential distinction between property which can be identified without segregation and property which is fungible/perishable (sugar or liquid) or intangible (shares and patents). ***Hunter v Moss*** provides authority for the fact that money and shares do not have to be segregated in order to be certain subject matter for a trust
    - Mr Moss owns 950 shares in his own company and in September 1986 it was orally said to Mr Hunter that he would give him 5% of his holding (50 shares) however this gift was never implemented as shares were never actually transferred
    - Despite formalities not being completed he was nevertheless still receiving the dividends from the shares
    - Dillon LJ felt that there was a valid trust over the shares; finding a trust would be a means of enforcing the terms of the employment contract between the parties and also it made no difference as to which 50 shares were subject to the trust given as there was essentially no difference between ordinary shares
        - Felt it was impossible to say that there was no situation in which the law permitted trusts over unsegregated property
    - Briggs J stated how a trust of a fungible mass, such as shareholding, will not fail for uncertainty where there has not been an appropriation of any specific part of the mass for the beneficiary, as long as the mass itself is sufficiently identified and as long as the beneficiary's proportionate share of the mass is not uncertain.''
    - Could there be specificity of subject matter as the respective shares had never been identified or separated?
    - Court felt a valid trust had been declared and it could be certain for subject matter; tangible property such as wine and gold were never identical but intangible property such as shares/finance could be identical
    - ''provided the shares were of the same class and the same company there was no need to segregate the shares before creating the trust''

        - The executors of the will would have been able to resolve any uncertainty as to the identity of the subject matter and essentially it would be for the executors to choose any fifty of the shares and transfer them to the trustee

    - This case is arguably an exception and an example of when the court departed from precedent so as to do justice between the parties

    - In this case the shares were of a single class and in a single company, and these are possibly grounds to distinguish it from the above cases

    - Key principle from the above case is that trust of part of a fungible mass will not fail for uncertainty where there hasn't been an appropriation of any specific part of the mass for the beneficiary, as long as the mass itself is sufficiently identified and as long as the beneficiary's proportionate share of the mass is not uncertain

Depends on subject matter to ascertain enforceability of the trust

- If the subject matter is part of some bulk and can be separate and individual they must be labelled

- However if the subject matter is money or shares then the above is not the case

In regard to present uncertainty as to subject matter

- It must be noted that a trust will not fail for uncertainty as to subject matter simply because of the present uncertainty. As long as the terms are sufficient to identify the subject matter in the future then a trust will not fail.

3)Certainty of Objects/Beneficiaries

Objects of the trust must be defined with a sufficient degree of certainty to enable the trustees (or the court if they default) to execute the trust in accordance with the intention of the settlor or testator

- Must look to see if the people intended to have the benefit of the property are sufficiently certain

No express trust can stand where there is vagueness as to in whose favour it has been created; someone must be able to come to court to enforce the trust. A beneficiary has a right in the property and therefore it is imperative to know who they are

- Effect is that the trust fails and the property would result back to the settlor's estate in the advent of not identifying the beneficiary

- Main distinction in relation to trusts is between a fixed/discretionary/bare trust

    1) **Fixed** is where the property and beneficiaries are fixed; all the trustee has to do is get the money and divide it amongst the beneficiaries and there is nothing left to be decided

    2) A **discretionary** trust is where the instruction is imperative therefore compelling the person who has received the property to act but nevertheless are afforded an element of discretion as to how they may act.

3) A **bare** trust is essentially where there is a fixed amount of money and a single beneficiary

- Rules for deciding if the beneficiary are certain or not are different depending on the type of trust

Is it a trust or a power?

Identify what the person intended to create in terms of his bestowal of a certain ability/ freedom on a trustee.

Must be asked what was intended by the testator

Did she impose an imperative obligation? If so, it is a trust

- Trusts impose obligations on a trustee which they are required to perform in obedience to the terms of that trust
    - Under a trust the beneficiary acquires proprietary rights in the trust property
- Trustee owes fiduciary obligations to the beneficiary further to the trust

If the instruction simply leaves the option to exercise rights, this will amount to a power:

- Powers do not create proprietary rights but impose obligations; there are two types
- If power has been given to a trustee or someone with whom there is a fiduciary relationship then it will be a fiduciary power
    - Trustee will have to nevertheless act in a justified manner
- **Fiduciary** powers give the holder of the power the ability to do an act but do not require the holder of the power do anything; must act in good faith
    - Gives holder of the power an ability to do an act (such as pay a certain amount to specified class of people) but does not require the holder of the act do anything
    - Falls short of a trust but provides authority to use it in a specified manner
    - Powers exercised by a fiduciary are not to be done in a capricious manner
- A **personal** power does not impose fiduciary obligations on the holder of the power and therefore such wielders of the power arent prevented from acting irrationally; will be a mere personal power
    - A personal power is given to an individual without making that person subject to any fiduciary duty in relation to the exercise of that power, as iterated in ***Re Hays ST***
    - A power would be regarded as personal if a certain individual is made out to exercise his discretion not as a fiduciary

- Megarry VC in *Re Hays ST* stated also how a person holding a personal power cannot have it invalidated on the grounds of uncertainty of objects
- In ***Re Wright*** it was again said that a person holding a personal power ‘’is entitled to prefer one object to another from any motive he pleases, and however capriciously he exercises the power the court will uphold it.”
- Tests are different depending on what type of power has been given

On occasions however the person will have left neither a trust nor power, but the person in receipt of the property might have been given it on a trust basis. Depending on what the testator intended to create the test will vary:

- Did they intend to create a trust, a power, or merely intend to give away the property absolutely
- Settlor must identify the beneficiaries with a certain degree of precision; trust will fail and property will result back to the settlor or testator in the advent of a lack of certainty.
- Fixed trusts provide no discretion as to the use of the property
- A discretionary trust provides an obligation (as per a trust) but are allowed discretion as to who can benefit from the trust

We can quickly summarise the requirements as to certainty of objects for different categories as:

- For fixed trusts it will be necessary to draw up a complete list of all the beneficiaries
- For discretionary trusts and fiduciary powers it will be necessary for the person claiming to be the beneficiary to show that he or she is/is not a member of the class of beneficiaries
- As for personal powers it is generally held that uncertainty of objects will not invalidate the trust due to the lack of an imposition of fiduciary obligations on the holder of the power

Mere Power

Postulant test: must ascertain whether a person is or is not within the class set out by the settlor/testator and it is down to them to prove it

- Trustees must be able to say with certainty as to whether or not the person coming forward does or does not fall into this category/class

A mere power granted to a trustee is not a trust obligation but a bestowment upon the holder of the power of the ability to exercise the power without being obliged to do so:

- Concerns a ‘’power of appointment” in the sense that whilst there may not be an obligation, the holder of the power has the ability to exercise that certain power
- In such cases there is no obligation on the trustee to distribute amongst the objects and they must merely consider the exercise of the power

- Where a person *May* use the power as opposed to being told they *Shall* use the power this refers to the idea that the
- y are under no compulsion to act
    - However if a person is acting as a fiduciary they cannot act capriciously in relation to the power

In the case of ***Re Gestetner's Settlement*** £100,000 was given to trustees to distribute amongst a certain class of people

- Harmon J said this was not uncertain as it was quite certain as to whether or not individuals would be regarded as objects and the uncertainty as to exactly which individuals fell within the class would not serve to invalidate the power
- It was said that where the trustee is given permission to exercise a power without an obligation the trustee's only obligation is to consider whether or not such a power should be exercised and if someone fell in the class
- Remains open to the trustee to decide if they want to exercise the power
- Fact it could not be ascertained in advance who exactly fell within the class would not serve to invalidate it

In relation to certainty of objects bestowed with fiduciary mere powers, the House of Lords in ***Re Gulbenkian's Settlement*** reversed the requirement of having to draw up a complete list of beneficiaries:

- The principle was laid out by the House of Lords that it could be said with certainty as to whether any individual was or was not a member of that class. If you can show you fell into the class and as long as it can definitively be said as to whether or not someone is in a class then the trust will be regarded as sufficiently certain
- This case set out the essential test of certainty for powers falling in this area in that there was certainty if it could be determined that any individual was or was not a member of the class
- For a trust to be valid the trustees must be able to say that **''any given postulant''** who sought to be a beneficiary **''is or is not within the class''** of objects
- Lord Upjohn said that ''the trustees, or the court, must be able to say with certainty who is within and who is without the power''.
    - If there is even one person with who the trustees are unable to determine whether they fall into a class of objects then the trust will be invalid
- It is vital that both the trustees and the court are in a position to be able to determine who are/aren't the objects of the power
- Any uncertainty as to whether a hypothetical postulant is or is not within the class of objects will invalidate the fiduciary mere power; must be able to say with certainty that a postulant is or is not within the definition of the class; any vagueness will leave the trust void
- Still more relaxed than the previous ''complete list'' test

- Lord Denning previously said that as long as ONE person could be identified with certainty then the trust will be valid; this approach was disapproved of in this case

Just because the whereabouts of an object are unknown and cannot be ascertained does not mean the validity of a power is brought into question

Megarry VC said in the case of ***Re Hays Settlement and Trust*** that in regard to a mere power, ‘’a trustee is not bound to exercise it and the court will not compel him to do so. This does not mean however that he can simply fold his hands and ignore it, he must from time to time consider whether or not to exercise this power and the court may direct him to do this.’’

- Reiterated idea from *Re Gestetner* that the trustee is only obliged to consider the exercise of such power
- However this above requirement exists only if they are acting as a fiduciary, and therefore they must act responsibly as well (contrary to the requirements of someone exercising a mere personal power)

In ***Re Manisty’s Settlement*** it was asked if a person who was within the ambit of the power, can he or she then require the trustee to exercise the power in their favour?

- Court cannot force someone to exercise their discretion but if they believe there to be injustice then the court will require them to justify the use of their discretion
- An object under a power does not have the same rights in the property as a beneficiary does under a trust
- However where a power is held by a fiduciary then you do have some rights as to the regulation of power by such a trustee
- Capriciousness is taken into account
- The facts of this case consider the use of power which is exercisable to anyone in the world

Fixed Trust

Refers to situations where there is a requirement in the trust provision for property to be held for a fixed number of identified beneficiaries

- Property is held equally for a certain class of people and therefore it will be necessary to know how many of them there are and who they are before the trust can be administered
- Trustees have no discretion as to how they can act and are obliged to act in the limited manner that has been specified

A fixed trust refers to one where the trustees are required to distribute the trust property to the beneficiaries in the proportions identified by the trust document. The case of ***IRC v Broadway Cottages Trust*** makes it clear that it must be possible to identify who all the beneficiaries are from the moment at which the trust comes into operation; a ‘’complete list’’ test.

- This requirement refers to the notion that the trustee must be able to name each possible beneficiary or to identify all members of the appropriate class
- If it is not possible for a complete list of objects to be drawn up at the time of distribution then the trust will be void from the start
- Even in the advent of the definitions of the objects being certain if it cannot be proved who the objects are then the complete list test will not be satisfied
- Out of the listed objects, if not all can be ascertained then the property will be distributed amongst those who can be ascertained and the share of anybody who cannot be ascertained can be paid into court

When you have decided that a trust has been created

- Trustee does not have discretion
- If the trust is to be certain the trustee must be able to determine, in advance, all the potential beneficiaries due to the need for property to be divided between them
- Test when the trust is fixed is the **individual ascertainability** test; means court is able to **draw a fixed list** of all potential beneficiaries, as laid out in *IRC v Broadway Cottages Trust*
- Does not matter that there may be 100 possible beneficiaries, all that matters is that you are able to list them all, if you cannot the trust will fail

Discretionary Trust

In such cases there is an obligation on the part of the trustees to make an appointment as to the beneficiary, but they have a degree of discretion as to who will benefit.

- Essentially the trustees are given a discretion as to which objects are to be benefitted by distribution of trust property and in what proportion
- An imperative obligation to distribute (so we know it is a trust) but they have discretion as to whom and in what amounts they distribute the property
    - Imperative words like ‘’shall’’
    - Essentially, the trustees must distribute but have discretion as to who
- Test for beneficiaries under this type of trust is the same as that for a fixed trust and therefore follows the ***IRC v Broadway*** principle

Main difference between this trust and a power is primarily that with a power a party is not compelled to act. In regard to a trust you look for language that essentially binds the conscience of the trustee and makes it definitively clear that they must act in a certain manner

- The *IRC* case revolved around a settlement being left on trust for the settlers wife and beneficiaries. It was possible to determine whether or not an individual was a member of a class but not to draw up a definitive list; could not succeed in cases concerning fixed trusts

In the case of ***Morice v Bishop of Durham*** it was said how the Court must be able to administer/control/discharge the trust

- Equality is indeed equity, but it is not what the settlor intended or he would have given the trustees discretion

If all the trustees of a discretionary trust die the courts made it clear they cannot take up the discretion and so historically where a trust was discretionary in nature, a fixed list of beneficiaries was drawn up and that was the only way they could administer the trust to the beneficiaries identified

- Due to need for trust to be administered by the court in such situations hence the requirement of a fixed list
- Court cannot exercise their discretion
- Even where the settler had left property to the trustee to deal with in a discrete manner, the court still required a complete list to be drawn up so they could deal with it in a worst case scenario
- Whilst this reasoning provides certainty for a trust, it does not uphold the intentions of the settlors: the settlor did not want a fixed list/class of people

In ***Mcphail v Doulton(Re Baden's Deed Trusts no1)***, a trust was definitely created due to the compelling nature of the words. House of Lords held that a deed created a trust as opposed to a power but despite being a trust it will not fail for uncertainty of intention and Lord Wilberforce rejected the narrow and artificial distinction between discretionary trusts and powers:

- "…the rule recently fastened on the courts by the *Broadway Cottages* case ought to be discarded and that the test for the validity of discretionary trusts… ought to be similar to that accepted by this House in *Re Gulbenkian*…*for powers, namely that the trust is valid if it can be said with certainty that any given individual is or is not a member of the class…*"
    - Acknowledged the historical problem with requirement of a fixed list
    - Therefore departed from previous requirement of a complete list of beneficiaries to be drawn up; it must just be possible to say of any given postulant whether or not their case was sufficiently certain
    - If it would be impossible to tell if an individual falls within the class of beneficiaries or not then the trust power fails
- Where the trust is discretionary the court should use the same test for beneficiaries as those for under a power; the ''is or is not'' test. The same test applies as in *Re Gulbenkian* in that the trustees must be able to look at the beneficiaries so as to decide whether they are or are not within the class of the beneficiaries intended to be benefitted under the trust
    - The test for powers and discretionary trusts were therefore brought into line with one another

- Went on to say that an assimilation of the test for validity does not involve the complete assimilation of trusts with powers; clear distinction between duties and obligation of a trustee with a power and a trust but the test for certainty of intention for the both are the same

- Just because you have assimilated the tests, there is nonetheless a significant distinction between a power which is authoritative and a power which is discretionary

- ‘’the court, if called upon to execute the trust power, will do so in the manner best calculated to give effect to the testator’s intentions. It may do so by appointing new trustees, or by authorising or directing representative persons of the classes of beneficiaries to prepare a scheme of distribution, or even, should the proper basis for distribution appear by itself directing the trustees so to distribute.’’

Lord Wilberforce said in ***McPhail v Doulton*** regarding certainty, that there were three types of uncertainty one may encounter:

a) Linguistic, semantic or conceptual uncertainty. For example if it cannot be said with certainty as to if the objects fulfil the criteria. Usually in relation to a class of people; such a type of certainty will render a disposition as void

    - *o* The situation in regard to this form of uncertainty refers to where the meanings of the words used in the trust are unclear, as encapsulated by Upjohn LJ in ***Re Sayer***

    - o Conceptual uncertainty will not be found to exist where the matter is sufficiently certain for the purpose it was made; in such cases this will be enough

    - o Usually will be found in cases where the words might ordinarily be familiar but vague in the sense they will be incapable of effect

    - o It was said in ***Re Baden*** that if words are found to be impossible of certainty as to the concept then the trust will fail

b) Evidential uncertainty. Perhaps referring to practical difficulty in ascertaining the whereabouts of certain objects. Evidential uncertainty will not fail the gift

    - o This asks the question as to whether or not the claimant can prove that they fall within the class of beneficiaries

    - o Even if the claimant cannot prove that they were in the envisaged class of beneficiaries this will not invalidate a trust

    - o Jenkins LJ in ***Re Coxen*** felt that a ‘’difficulty in ascertaining whether those (specified) events have happened or not is not necessarily fatal to such validity’’ of a trust

c) There may be cases where the meaning of words used are clear but the definition is so vague that it will be impossible to ascertain a class; will leave the gift unenforceable. This is known as administrative unworkability in that the trustees would be expected to work nonstop due to the hopelessly wide nature of the intended class of objects

- If the nature of the trust is such that it would be impracticable for the trustees to carry out the settlor's wishes then this would make the trust administratively unworkable.
- For the trust to be held as certain it is required that the trust be drafted in a manner where it is possible to administer the trust in a way that the judge can determine if it has been administered properly
- Arguably ascertains the capability of the trustees to distribute the trust subject matter to the intended beneficiaries
- In ***R v District Auditor ex parte West Yorkshire*** a trust was purported to be established for ''any or all or some of the inhabitants of west Yorkshire'' and this was held to be administratively unworkable due to the sheer size/ mass of the class of people. The trust failed.
- In *McPhail v Doulton* Lord Wilberforce made the point that where the requirements of a trust are such that it is impossible for the trustees to perform their fiduciary obligations then this will result in the trust being invalidated.
- Issue of **administrative unworkability** depends on if the transfer is a trust of power, in ***Re Manistry*** Lord Templeman said that it may still be possible to consider the exercise of appointment in regards to a power which would ordinarily be deemed as too large; all the trustee has to do is consider the exercise of the power and so does not make the burden administratively unworkable
- In cases of trust this will be enforced but this will not be the case in regards to powers

- Lord Wilberforce in this case felt the size of the class was not enough to make it administratively unworkable
- House of Lords in this case sent the case back down to the lesser courts to enforce the new ''is or is not'' test particularly to the class of relatives. The issue in regard to the word ''relatives'' was whether or not it would be deemed as conceptually uncertain

The case of *Re Baden (no2)* is exactly the same case as *McPhail* and saw the court of appeal applying the postulant test. This effectively mitigated the *McPhail* test in that it would validate the test which would under the *McPhail* test be considered invalid

- Asked the question if the term ''relatives'' could satisfy the ''is or is not'' test approved in *McPhail*
- Megaw LJ focused on the words of Lord Wilberforce as to the ''is or is not'' test
  - ''If, as regards at least a substantial number of objects, it can be said with certainty that they fell within the trust.''
  - It is not about the factual relationship, it is merely about whether or not you can PROVE you fit the criteria

    - The most a trustee could say was that there was no proof that a person was a relative
    - He felt the individual ascertainability test is satisfied if it could be said with certainty that they fall within the class
    - Harping back to the previous statement of Lord Denning in another case
    - Nevertheless did give rise to evidential problems in connection with proving that individuals are or are not relatives
- Stamp LJ felt relatives to mean ''legal next of kin''
- Sachs LJ is the favoured approach
    - ''Trace legal descent from a common ancestor''
    - When potential beneficiaries come forward and the trustees have to decide if they are in or out, then it comes down to proof; if you can prove you fit the criteria then you are in, if not then you are out
    - Blaced a burden of proof on the beneficiaries rather than leaving it to the trustees to demonstrate that the trust was valid. Onus was placed on the claimants to prove themselves as fitting the criteria in a trust

Courts have found other ways to circumvent the problem of conceptual uncertainty:

- The Facts of ***Re Barlow's Will Trust***were that a testarix died leaving a valuable collection of paintings which she decided should be sold subject to the proviso that any family/friends of mine be allowed to purchase the paintings at the price they were decided at in 1970. By the time this will was read it would undoubtedly be the case that the paintings would be worth a lot more. ''Friends'' would ordinarily be held to be conceptually uncertain
    - Browne-Wilkinson J felt ''accordingly in my judgment, the proper result in this case depends on whether the disposition in clause 5 (a) is properly to be regarded as a series of individual gifts to persons answering the description ''friend'' (in which case it will be valid), or a gift which requires the whole class of friends to be established (in which case it will probably fail).''
    - Went on to say that this was a lighter test; so long as there is one person who can satisfy the test then it will be valid. Up to the trustees to decide if they accept them as being a friend or not.
- In other cases, such as ***Re Tuck's Settlement Trusts***, a settlement was made that if the rest of his lineage married an ''approved wife'' of ''Jewish faith'' then they would be entitled to the money. This is arguably conceptually uncertain. Held that the Chief Rabbi of London would be a conclusive means of ascertaining whether or not the woman fulfilled the criteria, but the question was whether such a limitation would be valid and Lord Denning held this limitation would be valid and this trust was subject to a condition precedent

    - Held not to be uncertain and the clause delegating matter to a chief Rabbi was held to be certain

- In *Re Allen*it did not matter if the case was not subject to that absolute certainty requirement; test for that certainty becomes easier to satisfy. Testator left his house to the eldest son if his nephew stayed within the Church of England faith. As a trust this would fail but if it was a gift all that needs be done is the condition satisfied; test becomes easier

    - As long as it can be seen on any common sense level. Sir Raymond Evershed felt the words to be certain and of a sensible definition, the condition precedent was therefore regarded as valid for the purposes of upholding a trust

    - Essentially validates trusts where there were a number of postulants about whom one can be certain; reasoning used by Megaw LJ in *Re Baden* that a trust would still be regarded as valid despite some potential uncertainties as to a number of postulants, as long as there were a distinct core number of beneficiaries who could be said to satisfy the terms of the power

    - If it can be construed as a series of gifts subject to a condition then you may be able to find (as long as qualification can be sensibly defined) enforcement

FORMALITIES FOR THE CREATION OF AN EXPRESS TRUST

Declaration of trust

The old rule emanates from the case of *M'Fadden v Jenkyns* which made it clear that for there to be a valid declaration of trust over personal property, no formality will usually be required as long as it is clear that the settlor intended to create an immediate trust over the property.

Some trusts can be created without a formality at all, such as in *Paul v Constance* which shows how in some instances you can informally create a trust. Trusts of personalty (money, shares, chattels) do not require writing and an oral declaration will suffice

However particular formalities must be adhered to in certain situations and these are set out in statute; one of the maxims of equity is that it looks to substance as opposed to form:

- Inter vivos: trusts created in a person's lifetime

- Testamentary: a person is dead and has left their property in a will

Formalities of a trust are closely linked to the constitution of a trust.

In declaring a trust the formalities depend on the nature of the property involved and the time at which it was made

On death

If you want to leave property on trust after your death there are formalities

Section 9 of the Wills Act 1837 provides that ‘’no will shall be valid unless

- It is in writing, and signed by the testator, or by some other person in his presence and by his direction; and
- It appears that the testator intended by his signature to give effect to the will; and
- The signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and
- Each witness either:
    - Attests and signs the will or
    - Acknowledges his signature, in the presence of the testator (but not necessarily in the presence of any other witness)’’
- Effectively it must be in writing, must be signed, and must be signed or witnessed by 2 or more witnesses. Failure to comply will mean the will is invalid

Inter Vivos Trust Over Land

The basic notion is that in regards to trusts of land, where it has been declared orally the statutory formalities will not have been regarded as satisfied and the trust will therefore not be enforceable by the intended beneficiary

If you wish to make trust of land in your life time (inter vivos) it is governed by under Section 53 of the Law of Property Act 1925

- (1)(b) ‘’A declaration of trust respecting any land or interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will
- (1)(c) A disposition of an equitable interest or trust subsisting at the time of disposition must be in writing.’’

It is clear that you cannot create a trust of land in your lifetime in the absence of writing:

- Oral declaration is deemed to be valid but will not be enforced by the court until it is done in writing
- Where you wish to declare a trust of real property you must abide by section 53(1)(b) of the above mentioned act and declarations of trust in regard to land must be signed by the person declaring the trust
- Requirement of writing serves to evidence the settlor’s intention to declare a trust

This is different to a disposition of an equitable interest:

- If someone wants to dispose of an equitable interest, then 53(1)(c) says how a disposition of an equitable trust must be in writing if it is to be valid or enforceable
- When you are an equitable owner 53(1)(c) applies to all property

    - Once you are a beneficiary of land or money and you own an equitable interest then it must be in writing
    - Declaration of trust should not be confused with a disposition of property which starts with an equitable obligation

- These formalities are imposed to reduce the chances of mistake, fraud and ill-considered and hasty dispositions of property by a will

<u>*Inter Vivos* Trust Over Personal Property</u>

No formalities required for an Inter Vivos declaration of trust for personal property; oral agreement will satisfy the criteria as shown in <u>*Paul v Constance*</u>

- An absolute owner of personal property may declare himself to be the trustee of such property or may declare that such property is to be held by trustees on trust without the need for any written formalities
- Where you declare a trust in your lifetime of personal property this can be done informally and will be valid
- Once a trust is validly declared it is unviable
- This case demonstrated that for trusts of personalty, such as money, shares and chattels, writing is not required; an oral declaration of the trust is sufficient

<u>What if the Trust is not Express?</u>

If the trust isn't express, in accordance with Section 53(2) of the LPA 1925, ''this section does not affect the creation or operation of resulting, implied or constructive trusts.''

- Once a trust has been expressly declared, equity will not allow the statutory requirements to be used as instruments of fraud and so may impose a trust in certain cases

Equity acts on the conscience of people, and so just because someone has legal title of property, if they try to use the property for themselves then equity will step in and make it unconscionable for them to rely on such legal rights

Where the courts find a trust, this is called implied/constructive trusts therefore showing how the court recognises how not all trusts are made in an express manner

- In the cases where the court finds a trust, then the formalities are bypassed
- The requirements under 53(1)(b) and (c) do not apply in situations where it is the court constructing the trust

Equity, on that notion of rejecting fraud by using statute is backed up in <u>*Rochefoucauld v Boustead*</u>; essentially no valid trust will be found to have been formed where there was no valid declaration of such a trust, therefore avoiding fraud.

- A fraud will arise where land has been transferred subject to an oral understanding that it is to be held on trust and then the person to whom it has been transferred tries to deny the trust and claim absolute title

THE CONSTITUTION OF TRUSTS

A valid trust must be ‘’fully constituted’’. This requires that the property which is the subject matter of the trust must be vested in the trustee. This can be done either by the settlor declaring that they will hold the property as trustee for the beneficiary, or the settlor must transfer the trust property to the trustees. The legal requirements for transfer depend upon the type of property: land, shares, copyrights or chattels.

The established principle is simply that the intended beneficiaries will have no proprietary rights in the trust until it is constituted:

- It is not enough to simply declare a trust, for it to be effective it is necessary that title to property has been vested in the trustee
- Where a trust is found to have not been effectively constituted then law has developed in a manner whereby equity could intervene and find it to be valid

For a trust to be effective, the settlor must not only have an intention to declare a trust over property which they had rights over at the time of declaring the trust, but it is necessary for the person who is to act as the trustee to take legal title in the trust fund; making a trust properly constituted

The law will not enforce a gratuitous promise

The constitution is the moment when the trust is created and the legal title vests in the person who is the trustee; without the constitution of a trust, people will have no enforceable rights

- AT LAW THE COURT WILL NOT ENFORCE A GRATUITOUS PROMISE
- A PROMISES B THAT SHE WILL GIVE HER £1,000. B DOES NOT PROMISE ANYTHING OR GIVE ANYTHING IN RETURN FOR A'S PROMISE, THE LAW WILL NOT FORCE A TO KEEP HER PROMISE; THERE IS NO LEGAL CONSIDERATION.

A trust can be constituted in 2 ways:

1. If the absolute owner of the property declares themselves to be a trustee. The person who has legal and beneficial title to the property can choose to declare themselves as holding the property on trust for another person; they will retain legal title to the property but no longer have a beneficial interest in it as *Richards v Del bridge* pointed out. Also, the case of *Timpson's Executors v Yerbury* illustrated how a trust will be constituted immediately in such a situation as the title to the trust property is already vested in the settlor.
2. The absolute owner sets out who is the trustee and beneficiary and the subject matter is actually transferred to the trustee

The moment a legal title is vested in a trustee that is the moment when a trust will be constituted, and once this is the case the settlor cannot recover property that has been transferred

- Crucial need is to actually vest/give the subject matter to the trustee

Equity will not assist a volunteer, nor will it perfect an imperfect gift

Beneficiaries will be regarded as mere volunteers in the absence of a trust being constituted; intention to create a trust which is not yet fully constituted means they will be volunteers and ''equity is held to not assist a volunteer'':

- A volunteer under a trust is almost like a person who has not given consideration; ''equity will not assist a volunteer''
- If the thing promised is actually transferred to the donee then this will be a gift
- Whilst the declaration perhaps being valid, the trust will not be enforceable or regarded as fully constituted until you effectively transfer the subject matter to the trustees or declare yourself to be the trustee

In EQUITY the promise to give without any promise in return is said to be given ''voluntarily'', and the potential recipient will be regarded as a ''volunteer''

- If you give/promise to give someone something but nothing is given/promised in return, it will be an unenforceable gratuitous promise; said to have made a promise voluntarily

The leading case in this area is ***Milroy v Lord***, and any discussion in regard to constitution of trusts should start with this case:

- Turner LJ said that ‘’in order to render a voluntary settlement as valid and effectual the settlor must have done everything, according to the nature of the property comprised in the settlement, that was necessary to be done in order to transfer the property to the trustee and render the settlement binding upon him’’
    - Need to look at the type of property that is being transferred on trust
    - Everything must be done which needs to be done, depending on the type of property, by the settlor to vest the legal title to the trustee. If it is land it must be done in writing, but in the context of shares being transferred from one to another, certain other formalities need to be met; form along with shares need to be sent to the company who need to alter their register of shares
- When looking at constitution of trust the formalities based on the type of property need to be taken into account
- **Principles of conferring a benefit on a donee**
    - Could either give the property physically to the trustee
    - Transfer the property to a trustee
    - Declare himself a trustee of the property
- All requisite formalities must also be completed and until this is done the trust is not fully constituted. Must also be noted that the above case made it clear that if the transferor intended of disposing with the subject matter in a particular way, then equity will not uphold their intention by applying a different way of disposing the matter.

The case of ***Re Fry*** reaffirmed the decision laid out in ***Milroy v Lord***, but more recently it was reaffirmed in the case of ***Zetal v Kays***

Mitigation of the strict position set out in *Milroy v Lord*

The courts have indeed found ways of mitigating the strict position, and this was most famously demonstrated in the case of ***Re Rose***.

- It was argued by the Inland revenue that inheritance tax was payable for the shares as the registration took place on the 30th June and it was argued by Mr Rose’s party that as he sent off the forms in March (a month before the deadline and if the transfer was held to be effective in this month then no estate duty would be payable) this was not the case.
- Court of appeal held that Mr Rose had done everything in his power to divest himself off the property and there was nothing he could do about the delay of the company

    - Held that he had retained legal title of the shares until June and so was a trustee between March and June but this was temporary and accidental as a result of the failure of the company to register the new owners

- One transfer was intended to be a gift to his wife and the other for the transferee to hold on trust

- When he delivered the papers in March the court felt it was effective in the same month as the transferor had done everything in his power to effect the transfer by that date

- Temporary constructive trust which is a means of avoiding the conclusion of the gift being deemed ineffective

- Avoids harshness but does so in a way which is still in line with trust orthodoxy; if the transferor has done everything that he or she can do to effect the transfer then the transferor will hold the property on constructive trust for the transferees

The above decision in ***Re Rose*** is important as it does not undermine the Milroy rule but finds a legitimate way expressed through trusts; does not perfect an imperfect gift but expresses it through a constructive trust

- Still, there is a need for some form of expression which demonstrates the settlor's intention to label himself the trustee

The case of ***Choithram International SA v Pagarani*** once again concerned the appointment of trustees. The facts were that the settlor gathered at his bedside his accountant, the first secretary of the Indian high commission and three trustees as he wanted to create a philanthropic foundation of which the settlor was the founder and was also one of the trustees. He executed a deed and then verbally declared that he wished to give all his wealth and his shares from 4 companies to this foundation.However before his death no actual assets were transferred to the trustees and as the foundation was not a company it could not per se own the assets. Question asked was where the settlor intends for others to be trustees as well then must title to the property be transferred to the other trustees for it to be constituted?

- EXECUTES DEED CREATING PHILANTHROPIC FOUNDATION – CHOITHRAM AS SETTLOR AND CHOITHRAM AND SEVEN OTHER NAMED PEOPLE AS TRUSTEES

- VERBALLY DECLARED THAT HE WISHED TO GIVE ALL WEALTH IN THE SHARES FROM FOUR COMPANIES TO FOUNDATION

- HE DIED WITHOUT EVER SIGNING THE NECESSARY TRANSFER DOCUMENTS – NO ACTUAL TRANSFER OF ASSETS

- Lord Browne-Wilkinson felt that despite the settlor describing his donation as a gift, these words could only be construed to mean that he gives to the trustees of this foundation the property.

    - "…Although the words are apparently words of outright gift, they are essentially words of gift on trust."

- Even if the words were a valid declaration of a trust it was argued the trust was still not fully constituted as the assets were not fully transferred to the trustee (as argued by the claimants) but he was a trustee himself…
    - "There can in principle be no distinction between the case where the donor declares himself to be sole trustee…and the case where he declares himself to be one of the trustees. In both cases his conscience is affected and it would be unconscionable and contrary to the principles of equity to allow such a donor to resile form his gift…"
    - By the very fact he declared himself to be a trustee it was regarded to have been constituted; title to the estate was already vested in him and it did not matter that title to the estate had not yet been vested in other trustees
    - ''Although equity will not aid a volunteer it will not strive officiously to defeat a gift'' Lord Browne-Wilkinson
- In terms of his conscience, had he still been alive it would not have been allowed for him to keep the shares, so following this rationale it would only be fair to allow for the shares and wealth to be transferred to the foundation
    - His conscience was considered to have been affected by the trust as soon as it was declared to the extent that it would have been unconscionable for him to deny it
    - If he survived he would have been obliged by the trust to ensure legal title was vested in all the trustees
    - The principle derived was essentially that as long as one trustee has a title to the property then the trust can be considered constituted

Many commentators feel that the reasoning in ***Choithram*** was already a generous interpretation to say that it was a declaration of a trust but ***Pennington v Waine*** was felt to have overstepped the line in a significant manner:

- The donor told her nephew (oral declaration) that she wanted to give him shares in a company and wanted him to become a director of it.They both signed the share transfer form which was delivered to the company's auditor, but the donor died before the auditor had delivered it to the company and there was no mention of the share transfer in her will
- Question was whether she had made an effective transfer of her estate and disposed of her shares to her nephew seeing as the simple transfer of the form to the agent didn't establish that she had done everything in her means to effect the transfer (in accordance to the ***Re Rose*** principle)
    - Argued that she had intended an immediate gift of the shares but the residuary estate argued despite her intentions being clear she had not done so and so her gift was regarded as imperfect and she had not intended to become a trustee for Harold, unlike in ***Re Rose*** where he had done everything he could have. All Ada had done was fill a form and no intention was demonstrated

- Held by the court of appeal that the disposition of equitable interest to Harold was complete for a number of reasons
    - "…Ada intended to make an immediate gift. It follows that it would have been unconscionable for Ada to recall the gift. It also follows that it would have been unconscionable for her personal representatives to refuse to hand over the share transfer after her death. In those circumstances delivery of the share transfer before her death was unnecessary so far as perfection of the gift was concerned…"
    - Not necessary for the donor to have done everything short of registration to complete the gift
    - Clarke LJ felt that as long as in equity the transfer were intended to take immediate effect (essentially a private intention) then the gift appears to be okay.
    - The nephew was regarded as having an equitable interest in the shares so that they did not form part of his aunt's residuary estate and Arden LJ picked up on this point and held that since the nephew was told of the gift of the shares and he had been made a director of the company, it would have been unconscionable for his aunt to revoke the gift before her death.
    - Essentially saying that by completing the forms and doing no more, Ada is essentially making herself a trustee
    - Would have been unconscionable tor Ada to recall the gift; question revolves around why exactly her conscience should be considered
- Arguably there were two policy objectives in play in this case:
    - Firstly to uphold Ada's intention to transfer the shares
    - Secondly to prevent Ada or her personal representative from acting unconscionably by revoking the gift

Different types of Trust property

Trusts of land:

- In ***Richards v Delbridge*** Mr Richards sought to make a gift of a lease and the property itself to his infant grandson and wrote the following memo on the lease; **''This deed and all thereto belonging I give to Edward Richards from this time forth, with all stock-intrade''** and gave the deed to his grandson's mother to hold for her son. Question arose as to whether he effectively transferred the deed to his grandson in his lifetime
    - Formalities required had not been met and him simply writing on the deed was not sufficient to meet requirements of section 53
    - Neither had the lease been conveyed to the mother as a trustee as the deed did not include with sufficient certainty who he sought to make the trustee

- Property was held to not be disposed in his lifetime and fell to be dealt with in the remainder of his estate
- Shows what is not sufficient to satisfy requirements as to formalities of transfer of land

Trusts of Chattells:

- Intention to transfer chattels on its own will not be enough; no formalities required but you either have to give them the thing or declare yourself or someone else to be the trustee. In ***Re Cole*** Mr Cole bought a house and refurbished it for a significant fee. Soon he was declared bankrupt so Mrs Cole came to the house and took possession of the house. It was argued that the property was not hers to sell and she argued that he intended to transfer everything to her and so she could deal with it as she wanted
  - Words ‘’it’s all yours” on their own were not enough to perfect the gift of the chattels and she would have to show action to prove her husband’s intention to give her the things; if he had physically given it to her or put it in her name that would have demonstrated an intention
  - She remained a volunteer due to lack of provision of something to support his promise to her

Trusts of equitable interests:

- This is in regard to the beneficial rights under a trust. In ***Re McArdle*** the brothers and sisters of the claimant signed a document to reimburse him and his wife for fixing up the house. They all have an equitable interest and they are looking to transfer some of it back to the claimant.
  - “We the beneficiaries agree that the executors shall repay to you from the said estate the sum of £488 in settlement of the amount spent”
  - Court said if the brother had not given any valuable consideration in law, then in equity he was a volunteer
  - Promise to transfer was not effective and the interest was not constituted

Promises to settle property on a trust in the future

If there is a covenant to settle existing or after acquired property, but the intended beneficiary is a volunteer, can the intended beneficiary sue at common law, and if so, what would be the measure of damages?

It is held that this is not a valid trust at the time of declaration due to the lack of property which can be held on trust, however upon the property being acquired by the settlor and transferred to the trustee it will be constituted and effective

- Promises to settle property on a trust in the future isn’t enforceable at common law but ***Holroyd v Marshall*** makes it clear that if consideration has been provided then it will be enforceable in equity as a result of the principle that ‘’equity treats as done that which is ought to be done.’’

- Essentially depends on whether the intended potential beneficiaries are volunteers or not

- Consideration is relevant, but there is a particular type of consideration called marriage consideration whereby the very fact of getting married to a woman was held to be good consideration for the woman to settle her property; outdated but essentially a means of allowing access to property for a daughter

In the case of ***Pullan v Koe*** the wife covenanted to settle on the same trusts (marriage settlement) any property worth over £100 which she acquired after the marriage. Upon being given £285 as a present which was credited to her husband's bank account and some of which was used to buy bonds, the interest of which was credited to the account. It was held that the money from the bonds became trust property.

- The trustees were not considered to be volunteers and were considered to be within the fiction of marriage consideration

- If a person has given valuable consideration or ''marriage consideration'' in return for the promise of a future settlement, the court of equity will compel the settlor to constitute the trust.

Furthermore, in ***Re Plumptre's Marriage Settlement*** due to the next of kin not being within the marriage consideration they were considered volunteers and unable to enforce the covenant which a wife's father's money was vested in

- ''next of kin'' were outside the ''marriage consideration'' and were therefore volunteers and so the promise to settle was not fully constituted.

Fortuitous Constitution

Another way in which a trust is constituted is through the settlor vesting title to the subject matter in the trustees, and ***Re Bowden*** made the point clear that once title has been vested in the trustees the trust will be constituted and effective from that point onwards and cannot be revoked.

In ***Re Ralli's Will Trusts*** a testator had his estate on trust for his wife for life and then his two daughters Helen and Irene absolutely. Helen made a marriage settlement through covenanting to settle any property later acquired for Irene's children. Upon the widow and Helen dying, the claimant (Irene's husband) found himself the sole trustee of the testator's will and Helen's marriage settlements.

- Irene's husband was the trustee of Mr Ralli's WT and a party to Helen's covenant/ marriage settlement

- It was held that when someone is made a trustee, he becomes the trustee for all the property of the settlor

- The trust of the marriage settlement was constituted once the property had come to him even though it was in a different capacity from his position as trustee of Mr Ralli's trust.

- Trust was regarded as having been constituted

- It is the fact of legal title vesting in the trustee that constitutes the trust, and the reason why the legal title was vested in the trustee is irrelevant. The fact there was some property right vested in the settlor in this case compelled the trust to be carried out

Constitution and the common law

If the intended beneficiary has given consideration for the promise then the contract will be enforceable at common law. Equity (but not the common law) also recognises marriage consideration, whereas the common law (but not equity) recognises a promise by deed under seal – a covenant.

- If a person has provided consideration in return for a promise to settle property on them in the future, then it is enforceable at law (without recourse to equity) as it is a cont*nnon v Hartley* reaffirms thisractual promise for which consideration has been given and *Ca*
- Parties to a ''covenant'' can sue at common law
- A ''deed'' is a written document
- A promise that is written in a deed and signed by the named promisee and sealed is a ''covenant''. The seal is the consideration for the promise.

Exceptions

There are exceptional circumstances under which remedies might be available to volunteers, either directly or indirectly:

1. The rule in ***Strong v Bird***
    - **The rule in *Strong v Bird* deals with the perfection of an imperfect inter-vivos transfer.**
        - A case where an inter vivos transfer of property is imperfect as the relevant property has not actually been transferred to the relevant person.
    - In this case a son and his wife had their step-mother live with them and she paid them rent. The step-son wanted to borrow some money and she lent him some money on the basis that she would take it off the rent she was paying. After 2 months she proceeded to say it doesn't matter and he did not have to reduce the rent; her gift is imperfect. On the death of his step-mother the question for the court was whether the debt the step-son continued to owe could be considered to have been released through his appointment as executor of her estate.
    - This rule says that on the death of the step-mother the gift will become perfect when the transferee (step son) happens to be appointed as the executor of the estate. Held that the debt was released when he received probate of her will
    - Essentially conveys the idea that where the donee of a promised gift obtains title to the gift in another capacity this will be sufficient to make the gift

perfect. Usually applies (as in this case) where the donee receives the gift as an executor

- As executors have the same right as the trustee, this makes sense to alleviate him of his debt as he would have to basically pay himself. Decision expressed in two stages:
    - Transferee becomes executor of transferor's estate and receives legal title to transferor's property and so the intended transfer is constituted
    - Transferor showed a present and continuing intention to make the transfer in their lifetime

2. ***Donatio Mortis Causa***

- Donatio Mortis Causa is the other exception and covers the situation of a death bed situation whereby one does not have time to fill in a form. The law makes it clear this will only be applicable where death is imminent.
- It is a gift made in contemplation of death.
- Essentially where a donor sought to make a gift at a time when they expect to die but the title to the property hasnt passed whilst the donor is alive but might pass upon their death. Where the property is chose in action or land the donor's death will have the effect that the title will be vested in the donor's personal representatives rather than the donee; this doctrine comes into play at this point to compel the personal representative to give effect to the donee's title despite them being a volunteer
    - The property is given or purported to be given/transferred in the lifetime of someone who is about to die
    - Only reason for property being given is because you are dying; gift takes effect on the death of the person
    - Subject to the intention that the gift shall only take effect on the owner's death. If already received the donee is entitled to keep it but if it is imperfect the donee is compelled to make the trustee uphold the gift.
- Three conditions must be satisfied:
    a. Must be a clear intention to give but only if the donor dies. The gift is therefore conditional on death and the donor should intend the property to revert to them if they recover
    b. Must be made in contemplation (but not necessary expectation) of death by which it means that death must be imminent. This can be a host of reasons such as terminal illness or them embarking on a perilous journey
    c. The donor must surrender control of the property and so there must be some symbolic if not physical proof that they

intended to depart from the property. Property must be delivered to the donee, or an indication of title should be passed made with a view of the donor parting with the dominion over the property rather than parting with its mere physical presence.

- By ''parting with dominion'' it is meant that the donor should part with the ability to control the property
- In *Re Cole* regarding chattels, merely handing over the key to the place where the property is located would amount to parting with dominion
- The case of *Sen v Headley* showed that giving the donee keys to a box containing deeds was held to allow the donor to depart from the subject matter

- This doctrine functions through utilising a constructive trust; upon certain conditions being satisfied, equity requires the personal representative (to whom property would have passed upon the donor's death) to hold it on trust for the donee.

THE BENEFICIAL INTEREST AND FORMALITIES

Once you have got a validly constituted trust, the question then arises as to how the beneficiary can deal with the property? How do you validly deal with such an interest and dispose of it?

If a beneficiary has an equitable interest in trust property then if they wish to transfer this interest to another person they must comply with statutory formality requirements:

- Section 53(1)(c) of the LPA 1925 states how such a disposal of equitable interests or trusts must be in writing and signed by the person who is disposing them, or their agent, who is authorised in writing or by a will to do so
  - ''A disposition of an equitable interest or trust subsisting at the time of the disposition must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised by writing or by will.''
- In *Vandervell v IRC* it was stated that the rationale behind such a requirement is to prevent hidden oral transactions in equitable interests which would be a detriment to those who are really entitled to such interests

- The above section makes it clear that the absence of writing renders the disposition of the equitable interest void as opposed to unenforceable

In *Pearson v Lehman Brothers Finance SA* Briggs J accepted that electronic documentation was sufficient to satisfy the writing requirement contained in section 53(1)(c)

Many of the cases in this area revolve around stamp duty; need for writing to affect transfer of personalty (including equitable interest in personalty) gave rise to liability to pay stamp duty on the document

The nature of the beneficial interest

Romer LJ said in the case of *Timpson's Executors v Yerbury (HM Inspector of Taxes)* ''Now the equitable interest in property in the hands of a trustee can be disposed of by the person entitled to it in favour of a third party in any one of four different ways. The person entitled to it (1) can assign it to the third party directly; (2) can direct the trustees to hold the property in trust for the third party; (3) can contract for valuable consideration to assign the equitable interest to him; or (4) can declare himself to be a trustee for him of such interest.''

The question as to what formalities are necessary to dispose of one's equitable interest was picked up in the *Timpson* case where Mrs Timpson was a beneficiary under a trust in America, and over the years she wrote to her trustees asking her to pay sums of money to her children in the UK. Upon her death the question arose as to whether the trustees had to pay tax on the money owed to her children.

- Disposed refers to the movement of an equitable interest. If an interest is equitable, it must always be disposed of in writing for it to be valid.
- Court of appeal held her estate was liable for the tax and the question was whether the sums paid to each of her children were paid out of her income or the income of the child; was it her beneficial interest she was disposing of or was it theirs that they were about to inherit?
- Held that the equitable interest in property in the hands of the trustee can be disposed by the person entitled to it to a third party. They can use their beneficial interest to dispose of it in one of four ways
- Concluded that no equitable interest in the income ever passed to the children; regarded the letters as revocable mandates which conferred no rights on the children as they had provided no consideration. They were just instructions which were capable of being revoked

Essentially the person entitled to an equitable interest may, in accordance with the above case, dispose of their equitable interest in one of four ways:

1) Assign it to a third party directly
2) Direct the trustees to hold the property in trust for a third party
3) Contract for valuable consideration to assign the equitable interest
4) Declare himself to be a trustee for another of such interest

Purpose of the Provision

Purposes are envisaged as being:

- To promote certainty
- Trustee accountability
- Protecting the beneficiaries

The scope of the Provision

In 1959 In the case of*Grey v IRC* a granddad created a trust for his grandchildren who were beneficiaries under the trust fund. In 1955 he transferred 18,000 shares to himself as a trustee, therefore splitting his absolute ownership in legal terms with his trustees, leaving him with just the beneficial interest. He then telephones the trustees on the 18th of February and orally tells them that thetrust he created should be held for his grandchildren. On the 25th of March this was then put into writing.

- Because the law requires this passing of value to be in writing and it is the writing which attracts the stamp duty by the Inland Revenue, many people avoid writing so as to avoid the tax. Question was if this was a valid disposition.
- (Disposition has the meaning of moving a value around; law requires this to be made in writing so as to tax it. Many of these cases avoid disposition through writing so as to avoid paying tax)
- Question was if the 25th March documents had transferred legal value
- According to section 53(1)(c) it will have only be disposed at the point of writing
    - Oral instructions did not comply with the section
    - The execution of the documents by the trustees on the 25th March did conform and so were liable for tax
- The effect of the direction to the trustees to hold the shares on trust for the grandchildren was to dispose of the settlor's existing equitable interest in the shares and this could be done only through writing and not orally; dispositions were effected when the documents were executed and so stamp duty was payable
- To avoid this outcome he could have simply declared the trust; no formalities for declaration of personal property

The above case demonstrated not only the purpose of the provision but also illustrated what the case would be when one directs the trustees to hold the property on trust for a third party; one way of getting around the formalities

Specifically enforceable contracts:

Another way to get around the formalities is for the court to construct a trust where it would be unconscionable to allow the legal owner to go back on their word once a trust had been declared; if it is an implied, resulting or constructive trust then there are no formalities. Where the court constructs a trust then no formalities are required; demonstrated in *Re Rose*.

Oughtred v IRC asks when certain formalities will be necessary. Showed that if an agreement to transfer shares is contractual and may give rise to the equitable remedy of specific performance, then the need for formalities may not be required. She was a beneficial owner of 200,000 shares but was also the absolute owner of 72,700 shares. Mum agrees to give her son 72,700 shares but she must get 200,000 outright resulting from the transfer of what will eventually be inherited by him.

- To avoid tax liability on her estate upon her death she entered into a tax avoidance scheme which involved her orally agreeing with her son that she would transfer other shares to him which she owned absolutely in return for her son to release his remainder interest in the shares held on trust
- If this agreement was regarded as a disposition then it must be taxed and if not, then had the beneficial interests in these shares passed to his mother orally?
- Whilst it was held by the House of Lords that there had been a disposition which could only be effected in writing
- However it was argued that 53(1)(c) didn't apply because the oral agreement made earlier had created a constructive trust of his equitable interest in the shares and so the agreement was specifically enforceable in equity
- Held by Viscount Radcliffe (in dissent) that when mother and son made a contract to swap their reversionary interests, this was a contract to transfer equitable interest to his mother; not volunteers as they had both provided consideration
- As they had entered into a contract, the court should specifically perform it in equity due to the unique nature of the shares
- If it can be seen that equity will ''consider as done that which is ought to be done'', then it will be enforceable, and Peter is deemed to be a constructive trustee of those shares for his mother.
- No need for writing. However the court did not find this outcome, but Viscount Radcliffe gave good reasoning to support it
- Where a constructive test will arise as a result of 53(2) then equitable interest would be regarded as having passed: Legitimate tax avoidance scheme

The dissenting opinion of Viscount Radcliffe in the above case subsequently found favour not only in *Re Hobbs Settlement* but also in *Neville v Wilson* where the court of appeal clarified the relationship between section 53(1)(c) and section 53(2)

- In the case, the nominees who were directors of UEL held 120 shares in UEL on trust for Jen.
    - Jen became defunct and its shareholders paid all outstanding liabilities and orally agreed between themselves to dispose of the equitable assets of the company between the shareholders
    - Question arose as to whether this oral disposition effectively transferred the equitable interests to the shareholders, or should it have been in writing? Did this agreement cover the 120 shares?

    - Was held that Lord Radcliffe's opinion in *Oughtred v IRC* was ''unquestionably correct."

- In this case the shareholders of a company had entered into an oral agreement for the informal liquidation of a company, part of which was that the company's equitable interest in the shares of another company should be divided amongst the shareholders

    - It was decided that since the agreement was specifically enforceable (as a result of consideration being present) a constructive trust of the shares was created and writing was therefore not required

    - Held Viscount Radcliffe's opinion was valid and the relationship between the two sections was not made clear enough

        - Nothing in *Oughtred* was decided that prevented such a conclusion

Above cases provide legitimate way of avoiding 53(1)(c). Also, where the court finds that the person who made the promise is a constructive trustee under 53(2) then no writing is required

Conveyance of the Legal estate by a Trustee:

The *Vandervell* saga revolved around Mr Vandervell donating vast amounts of money to a college to fund pharmacology.

- Legal owners of the shares were the bank and Mr Vandervell is the sole beneficiary

- He orally directed the bank(trustees) to transfer 100,000 shares in his company to the royal college of surgeons; seeking a disposition

- Transfer of the shares was subject to an option which was the legal right to buy back the shares. Such an option was owned by the Vandervell trust company and have the right to exercise the option to buy back all of the shares which have been transferred to the college once sufficient dividends have been declared and they have got back their money

- The bank (trustees) made this transfer between 1958 and 1960 and the IRC then claimed he was liable for tax for the dividends paid on the shares as they claimed he had not got rid of the equitable interest he had owned so that the dividends remained part of his income and were therefore liable for tax.

- House of lords held that 53(1)(c) only applied to cases where the equitable interest in the property had been disposed of independently of the legal interest in the property. Court said that when he directed the trustees to transfer the shares, such a transfer was of both legal and equitable title; for the years they were being declared dividends, the college had legal and equitable title and were temporarily the absolute owner of the shares.

    - 53(1)(c) only applies where you are moving the equitable interest alone

    - As in this case he moved both legal and equitable title, the section would not apply and his instructions would not be a disposition due to this fact

- The option given to the trustee company by Mr Vandervell was not given with clarity as he did not explicitly state which trust fund he wanted the company to hold. For the lack of the 3 certainties the beneficial interest reverted back to Mr Vandervell making him liable for tax
    - Court said had it not been for the Inland revenue, he would arguably be alive (!)
- Because the legal title passed with the equitable title, it fell outside the ambit of section 53(1)(c)
    - Equitable interest had passed for a certain period of time but it then reverted back to Mr Vandervell making him liable to pay surtax
    - Due to Vandervell Trustees Ltd holding the option on a resulting trust for Mr Vandervell, he was regarded as retaining an equitable interest in the shares

The case of *Grey v IRC* was distinguished here because in that case the legal title had remained with the trustee and the beneficiary was only dealing with the equitable interest. In this case however the beneficiary had directed the trustee bank to dispose of both the legal and equitable interest, resulting in the destruction of the latter.

The way in which you can transfer a beneficial interest without the need for writing is by doing so absolutely

Declaration of trust with consent of beneficial owner:

The case of *Re Vandervell's Trusts (No 2)*looks at a different period of time from the first sets of litigation, and the trust company wrote to the IR that they had the legal title but were holding it for the children's fund. Argued this was a valid declaration of a trust for the children. In 1967 Mr Vandervell made his will and was about to marry his personal assistant; made no provision for his children and stated expressly that the reason he was making no provision was because he had already set up a trust fund for them. 6 weeks after he made his will and his marriage, he died.

- Trustee company uses £5,000 from the Vandervellchildrens' fund to buy back the option
- Me Vandervell argued that from date of buy-back, shares were held by trust company for the childrens' fund
- Trustees wrote to Inland Revenue in 1961 to this effect
- In 1965, Mr Vandervell executes a written deed transferring his interest – if any remained – in said shares to childrens fund
- Also in 1965, the inland revenue claim Mr Vandervell owes tax on all dividends paid between 1961 (after option was exercised) until 1965 (when written deed was finally executed) – the option had resulted back to him and he did not effectively dispose of it until 1965 (when put in writing)
- In 1967 – on the occasion of his marriage – made a will, no provision for his children – he believed they were provided for under the children's fund

- 6 weeks later he died, on March 10th 1967
- Did the shares reult back to Mr Vandervell between 1961 and 1965?
- Did he have to pay surtax?
- Were the shares held for the children during this period?
- The new Mrs Vandervell claims that shares did result back to Mr Vandervell during the said period – estate will pay surtax and keep the rest!

Two issues were to be decided in the case:

1) Did the shares result back to Mr Vandervell between the periods so that he was liable to pay the tax dividends? Or were they being held by the trust company?
2) Was the Inland Revenue correct and children would get nothing?

Megarry J found on first instance that the option was to be held on resulting trust for Mr Vandervell as opposed to the children. Executors argued that his intention was to no avail; had equitable interest and this resorted back to him and he did not dispose of it until 1965

- In the court of appeal however Lord Denning said that a resulting trust for the settlor, is born and died without any writing, and comes into existence whenever there is a gap in beneficial ownership. As soon as a gap is filled by creation or declaration of a valid trust, the resulting trust comes to an end. In this case, prior to the option being exercised there was a gap, but as the option was exercised and the shares registered in the trustees name, there was a valid trust created for the children's settlement.
    - ''As the option was exercised, and the shares registered in the trustees name, there was created a valid trust of the shares in favour of the children's settlement. Not being a trust of land, it could be done without writing.''
    - Was a case of the termination of the resulting trust which arose automatically
    - Strong equitable evidence that the shares belonged to the children:
        - Evidence of intention to hold it for the children; £5k was taken from the children's fund and it would have been inequitable for such money to be taken out if not for the children
        - As soon as the option was exercised, the company wrote something to the IR that they were holding it for the children
        - All dividends from the shares was paid to the Vandervell company and was being held for the children
    - Used idea of estoppels in that had Mr Vandervell lived, he would have no claim to the money; equity would not allow such unconscionable conduct in going back on his intention

        - Court of equity would have stopped him from doing so as it would not have been just or conscionable
        - Wife would not have been in a better position that Mr Vandervell to claim the money
    - Felt he made a perfect gift to the company in the form of the shares
    - End result is that the children's settlement was deemed to be the beneficiaries under the trust created prior and the estate was not liable for the surtax
        - The transaction involved the extinction of the resulting trust and the creation of a new equitable interest under an express trust. As this didn't involve the disposition of a subsisting equitable interest no writing was required

<u>Other ways to dispose of an equitable interest:</u>

Can a beneficiary declare that they wish to now hold their equitable interest on trust for someone else?

- Yes, but theyre disposing of the equitable interest (required formalities) or are they declaring a new (sub)trust) (which, depending on the property in question, may not require formalities)
- If you do give your beneficial interest away, the question is always if it is a declaration of a new trust or is it a disposition? Formal requirements are different.
    - Disposition only occurs when a beneficiary directs a trustee that property is held on the same trusts but for different people
- Distinction between disposing of an equitable interest and the creation of a sub trust which will arise where a beneficiary under an existing trust agrees to hold part of that trust for another
    - Where property is being held on trust for another (A) by a party (B), and (A) declare a sub-trust of that equitable interest for another party (C) then this shouldn't require writing as a new equitable interest is created for (C) which is different from the original equitable interest and (B) still retains his equitable interest
        - This person (C) will be a sub beneficiary
    - For a valid sub trust to arise as opposed to a disposition, the original beneficiary must retain some right in the property and remain active in their trust
        - Look factually at what is going on and then look at the property in question

<u>Contracting with the third party to assign the equitable interest:</u>

Note that ''A contract for the sale or other disposition of an interest in land can only be made in writing'' as stated in section 2 of the LP(MP)A 1989

Declaring a trust of the equitable interest:

Potential overlap with section 53(1)(b) of the LPA where the property concerned is land

- ''A declaration of trust respecting any land or interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will''

Has the beneficiary reserved any duties? Should this make any difference?

- *Grange v Wilberforce* is an example of a disposition and *Re Lashmar* concerns valid creation of a sub trust

Nominations:

This does not involve the disposition of an equitable interest within section 53(1)(c) since the interest is not subsisting at the time of the disposition

- In the case of *Gold v Hill* the deceased had nominated his solicitor as the beneficiary of a life insurance policy, with the intent that the solicitor should use the proceeds of the policy for the benefit of the deceased's partner.
    - Valid despite not being in writing because there would be no subsisting equitable interest until the proceeds of the policy had become due on the death of the deceased

Disclaiming the beneficial interest:

Can you simply disclaim your equitable interest?

In *Re Papradise Motor Co* a step father made a trust of shares to his step son making him the equitable owner of the shares. Upon being made aware of his step dad's actions, he made it very clear that he wished to make no claim on these shares. The company went into liquidation and the shares turned into money at which point he said he only orally disposed of his interest and was entitled to it.

- Whilst a disclaimer works as a means of getting rid of an equitable interest it is not a disposition and therefore can be validly made orally
- Manifestation of an intention to disown or disclaim an interest will suffice and writing will not be required.
- It was confirmed that a disclaimer worked by means of avoiding an equitable interest as opposed to a disposition of an equitable interest
- Court said what he had done was disclaim and avoid his equitable ownership and this was not necessary to be done in writing
- This case demonstrated that where a beneficiary disclaims their interest then this doesn't need to be in writing as the result of the disclaimer is that the equitable interest is destroyed as opposed to disposed
- If the statement was a disposition of the shares, then writing would be required. However the court held a disclaimer to be distinct of a disposition, and this was a means for him to avoid his equitable interest

THE BENEFICIARY PRINCIPLE – PRIVATE PURPOSE TRUSTS – UNINCORPORATED ASSOCIATIONS

A further essential ingredient needed for the effective creation of a valid trust is that there must be a beneficiary; some person who is capable of enforcing the trust.

The Beneficiary Principle

As private trusts are made for a person as opposed to a purpose, the beneficiary principle simply requires property to be held on trust for identified beneficiaries or objects; need for someone to be available to enforce the trust

Sir William Grant MR in the case of ***Morice v Bishop of Durham*** said **''every non charitable trust must have a definite object. There must be somebody in whose favour the court can decree performance''**

- Public charitable trusts are exempt from the beneficiary principle as stated in ***Morice v Bishop of Durham***. This concerned a gift to the bishop of Durham as a trustee so he can apply it ''for such objects of benevolence and liberality which he on his own discretion can approve on''.
- An express trust for persons must have identifiable people in whose favour the court can decree performance
- Held to be made for purposes and is a private purpose trust and falls foul of the beneficiary principle; void due to lack of identifiable beneficiaries
- Held there can be no trust for which the court cannot assume control, and every trust must have a definitive object

- It is a fundamental principle of the law of trusts that the objects of the trust are people rather than purposes because there needs to be ascertained or ascertainable beneficiaries who can enforce the trust
- Where there is no person who can come to court to enforce the purpose, lord grant said there cannot be any trust over which the court cannot assume control over; if the court cannot do this then the trust will fail
    - Where trusts are for abstract purposes it will be invalid
- It is a requirement of English Trusts law that there must be at least one beneficiary in whose favour the court can decree performance of the trust

It is the beneficiary's proprietary right in the trust property which gives the beneficiaries the *Locus Standi* to petition the court if the trustees fail to perform their duties

Viscount Simmons said in ***Leahy v AG for NSW*** ''A gift can be made to persons but it cannot be made to a purpose or an object unless the purpose or object be charitable. For a purpose or object cannot sue, but if he be charitable, the Attorney General can sue to enforce it''

- Showed how if an express trust for purposes was charitable in nature then it would be valid
- This doesn't undermine the rationale of the normal rule in that only the AG and the charity commission are charged with the duty of enforcing charitable trusts
- A purpose or object cannot sue, but if it is charitable then the AG can sue to enforce it; important to differentiate between private purpose trusts and public ones. Court must first decide if it is a people or purpose trust; whilst this beneficiary principle operates to invalidate private purpose trusts but there are exceptions and ways devised by the courts to circumvent this rule

Harman J said in ***Re Wood*** that ''**a gift on trust must have a *cestuique* trust, and there being here no *cestuique* trust the gift must fail.**''

The beneficiary principle also underlines the now well established principle that as equitable owner, a beneficiary of full age and sound mind may call upon the trustee to convey the title as they please, as demonstrated in the case of ***Saunders v Vautier***. A purpose trust will not be able to do this

- Where there is no beneficiary capable of enforcing the trust, the rule is that there is no valid trust

Does the beneficiary principle apply irrespective of how socially useful the proposed purpose trust might be? Should it be?

- In ***Re Astor's ST*** a trust was purported to be created for ''**the maintenance of good understanding between nations**''; no person entitled by right to enforce the trust. **Held** that equity will not recognise a direction to apply the equity where it was not made for the benefit of individuals
    - Void because the identified purposes were considered too uncertain

- ''A court of equity would not recognise an equitable obligation, affecting the income of large funds in the hands of trustees, a direction to apply it in furtherance of enunciated non-charitable purposes in a manner which no court or department could control or enforce; therefore, the trusts were void on the ground that they were not trusts for the benefit of individuals''

- In ***Re Endacott*** residuary estate was given to a parish for the ''**purpose of providing some useful memorial to myself**''. Held that whilst there were some exceptions to the beneficiary principle, this purpose was far too wide and uncertain and any exceptions which did exist should not be extended

    - Not charitable even though it purported to be a ''public trust'' and was void

- ***Re Shaw*** showed the rule in action once again whereby something was left over to develop a 40 letter alphabet. Held a trust was invalid as it lacked a human beneficiary

    - Held to not be a charitable purpose and the trust was void as a non-charitable purpose trust

Where the purpose is very abstract it will fail for the want of a human beneficiary:

- A trust which isn't for the benefit of ascertainable beneficiaries is described as being a trust for the pursuit of an abstract purpose. Trusts for abstract purposes are void under English Trust law precisely because there is no beneficiary who can enforce the trustees' obligations before the court

Objections to private purpose trusts/justifying beneficiary principle:

Martin notes that in the 19th century courts were permitted to allow trusts for purposes but the courts in the 20th century took a wrong turn. However she identified 4 main objections vested in the courts for not allowing private purpose trusts

Enforceability:

- Idea that without a human beneficiary to come before the court to enforce the trust, then it will be invalid
- Trustees are obliged to distribute trust property
- Cannot be an obligation on the trustees unless there is a correlating right in someone to enforce such an obligation
- A lack of a human to enforce the trust is a primary reason for such rules existing

Uncertainty:

- The exceptions however have been expressed with sufficient certainty
- Usually poor drafting will result in the trust being unenforceable; where the subject matter is so vague and uncertain the courts cannot enforce the trust

Excessive delegation of testamentary powers:

- With a purpose trust the absence of a human beneficiary means it is down to the trustees to determine how the trust is to be applied
- The testators wishes are being bypassed as the trustees will have total control; power is no longer with the person who wrote the trust but with the trustee

Perpetuity:

- Refers to something that goes on forever/long time
- Revolves around policy notions
- Whilst charity trusts are exempt from this rule and is allowed to go on forever, private express trusts are subject to particular rules in relation to perpetuity
- Policy is to prevent property from being tied up, in a family for example, for too long
- Purpose is also to arguably prevent wealth from being locked away indefinitely otherwise the rich will be in a position to control their assets for many generations
- Showed a shift towards free markets and free circulation of capital
- Common law rule in relation to perpetuity is that ‘’no interest is good unless it can be vested within 21 years’’ in a beneficiary; if this would not happen then the trust would be void for perpetuity.
    - This was the rule until 2009 where section 5 of the accumulation and perpetuities act came into force which extended the period to 125 years even if the trust instrument specifies a different period
    - The period generally starts when the trust instrument or will takes effect, but where the trust instrument is made in exercise of a special power of appointment, the perpetuity period will start when the instrument that created the power takes effect

Exceptions or ‘’occasions when Homer has nodded’’:

Idea that a trust cannot be for a purpose as the purpose is unable to come to court to enforce it, as well as for various policy reasons. However there are exceptions, but these are limited to 3 types of trusts which seem to form an ‘’anomalous category of exceptions’’. Some older authorities have given validity to these exceptions

The following categorisation, of mostly Victorian, exceptional cases, is the collaborative work of academics, notably Professors Morris and Leach, and the judges. Sometimes called trusts of imperfect obligation in reference to the fact that the obligation of the trustee to perform the trust is imperfect in that the trustee is allowed to carry out the purpose of the trust if he or she wishes to do so but isn’t obliged to do so

- Martin feels the actual language in some of these cases is actually wide and relatively generous. Must be reiterated that trusts which are not for charitable purposes will fail unless they fall into these exceptions

1.Erection or maintenance of monuments and graves:

- Trusts for the erection/maintenance of tombs or monuments have long been regarded as valid as long as they satisfy the perpetuity rule; ***Pirbright v Salwey*** showed a trust to maintain a grave and to decorate it with flowed was held to be valid
- In ***Re Hooper*** a trust for the care and upkeep of family graves and monuments was held to be valid for 21 years only (old limit under perpetuity)
- Cases have allowed this purpose such as ***Trimmer v Danby*** where a tomb was considered as a valuable funeral expense
- Been described as a trust of imperfect obligation as there is no person who can actively come to court and enforce it, but there is an obligation to do something which is imperfect as there is no beneficiary to make them do it
- ***Musset v Bingle*** trust was left to erect a monument of the widow's first husband. Court upheld the request. However a second request for £200 for the upkeep of the monument was rejected as it could go on indefinitely and therefore related to perpetuity
- In ***Re Hooper*** request was made for upkeep of monuments and placing a stone in the wall of a church window, as far as the trustee could legally do. Justice Mourn felt that such a trust was capable of being valid
- Very often in these cases the trustees are happy to carry out such a purpose and if it can be fulfilled within the perpetuity period then Gill Martin's arguments would not be offended

2.Maintenance of particular animals:

- Trusts for the maintenance of specific animals whereby a trust is created to ensure the animal is looked after
- ***Re Dean*** the court acknowledged that this was valid despite the animals being unable to come to court to enforce it. Asserted generally that a trust without a beneficiary to enforce it could be capable of being upheld
    - Trust for the maintenance of the testator's horses and hounds for fifty years as long as they lived that long was held to be valid even though it wasn't charitable and nobody could enforce it
- *Re Calley* it was held that lives refer to and mean human lives
- Where performance of the trust was capable of being supervised, then this 1849 case displaced the notion that it was not capable of being enforced
- Where there is a way of the court getting around 4 objections then the court will allow purpose trusts

3.Saying of private masses:

- Trusts for the advancement of religion are valid trusts

- The sayings of masses which the public are entitled to attend will be charitable
- Masses that were said in private would not have gained charitable status and would thus fall foul of charitable status
- So long as the masses in question were said in public then the trust would be charitable
    - In ***Gilmour v Coates*** a gift to nuns was invalid as they were not beneficial to the public. If a court found this to be valid then the court would essentially say that prayers worked; cloister group failed
- Earlier cases held that charitable status could be extended to masses. In ***Bourne v Kean*** it was said trusts would no longer be void for certain reasons, as long as they were not illegal and didn't offend perpetuality
- Saying of private masses is the most problematic of the exceptions

Will these categories be extended or increased?

- Harman J said in ***Re Endacott*** that ''these cases stand by themselves and ought not to be increased in number, nor indeed followed, except where the one is exactly like the other.''
- Law in these few exceptional cases made it clear there is no strong rationale as to why the beneficiary principle has not applied in these cases
- These anomalous cases shouldn't be applied unless the wording is exactly the same as the ones in the mentioned cases
- Some trends; if trustees are willing etc
- Generally described as ''troublesome, anomalous and aberrant''
- Law acknowledges this category of exceptions but has explicitly stated it is not willing to extend this principle
- Largely allowed as a trustee was willing to take the burden

In ***Re Astor's ST*** it was further stated that where purpose trusts are found to be valid in such cases, the purpose must be described with sufficient certainty

Private or Purpose trust?

At some level nearly all purpose trusts will affect people; whilst on the face of it a trust could only be in regard to a purpose, however where there are people capable of enforcing and upholding such a trust which could affect them, they would be able to enforce the purpose

- Almost all purposes arguably have a person who could be unearthed so as to enforce the trust
- This approach has been adopted by the court

For example in regard to a trust made to build a pool could be construed as being made for the benefit of a certain class of people who could use the pool such as the employees

- Manner of interpreting trusts in this manner is attractive where one is not bound by the purpose and is free to bring it to an end
- In the case of ***Re Bowes*** a trust was made for £5k for ''planting trees for shelter'' of an estate
    - Whilst on the face of it this would be a purpose trust. Court had to answer the question if this was a trust for a purely private purpose
    - Held it was a trust for the benefit of the estate and the persons who are entitled to the estate, having the end result that the express purpose was construed by the court as merely being the motive for the making of the disposition which was made for the estate owners
    - Court will recognise the people as having standing and they can come to court if the trustees were not using the money to plant trees for shelter. Court will recognise humans in those situations as being beneficiaries of the trust
    - As there were identifiable human beneficiaries the trust was allowed to be enforced
- Courts have recently moved towards the above way of thinking as demonstrated in ***Re Denley*** where a plot of land was conveyed subject to rule of perpetuities for a sports ground for the employees of a company as well as the use of any other persons whom the trustees would allow. Was this void for being a trust of purpose?
    - **Gough J held** that there may be a trust which benefits individual(s) but where it is so intangible that it gives no locus standi, then the beneficial principle would apply to invalidate the trust
        - Need for some direct or indirect benefit
        - ''where, then, the trust, though expressed as a purpose, is directly or indirectly for an individual or individuals, it seems to me that it is in general outside the mischief of the beneficiary principle.''
    - There are certain purposes which are so abstract that it would be impossible to have anyone come to court to enforce it and in such situations the beneficiary principle would apply. However the judge felt this was not the case in the current case and the individuals could enforce it
    - We can directly or indirectly identify human beings who would be recognised by court to have rights to enforce the purpose, then in such situations it will regard the trust as enforceable and outside the realms of the beneficiary principle
- Oakley states that in cases where the above case has been applied has also fallen within the perpetuity period; trusts would only be valid for the stated period.

- What allowed the court to find the purpose in the above case was the fact that the testator himself had said in the trust that it was within the limits of perpetuity; could not be used indefinitely

Unincorporated Associations

The basic principle is that gifts made to unincorporated associations must be structured correctly or else they will constitute invalid purpose trusts

An unincorporated association refers to an unrecognised organisation where it is just a group of individuals who share a mutual concern to promote their mutual purpose; such organisations suffer from the beneficiary principle. They are essentially a non-commercial club or society:

- Difficult in law for such societies to hold property due to lack of legal identity
- As it is legally not a person it cannot own property

What is meant by an unincorporated association?

- An association according to the Oxford dictionary, importantly, that has no legal personality distinct of that of its individual members
  - A group of people bound together by a contractual agreement but it is not a separate legal person
  - Property must be given to some person to hold on behalf of the unincorporated association
- Hudson feels they exist somewhere between individuals and companies and the fact they are unincorporated means they have not been incorporated as a company but is made up of groups of individuals who come together for a purpose
  - Group of people who have joined together to form a club or society to pursue a common purpose
  - ''unincorporated'' simply means that they have not been incorporated as a company
- **Lawton LJ** defines it in *Conservative v Burrell* as being ''two or more persons bound together for one or more common purposes, not being business purposes, by mutual undertakings each having mutual duties and obligations in an organisation which has rules which identify in whom control of it and it's funds rest and on what terms and which can be joined or left at will''
  - Need for something that is structured for it to be effective such as a constitution, and without these characteristics your association will not be an unincorporated association
  - Association must be non-profit-making and its members must be bound together by identifiable rules such as a constitution of the association
  - Conservative party in this case was held not to be an unincorporated association because it consisted of a number of different components, such

as local constituency parties, parliamentary parties and central office which were not contractually bound together as one association by a single constitution

- Cannot give something to the association itself and this problem is made worse when considering that to give a gift to an individual would open it up to the risk of being used in a contrary manner to that envisaged initially
- Whilst the clubs cannot own property, the members can

How can an unincorporated association receive a gift?

Absolute gift:

- ***Cocks v Manners*** shows how a gift could be made to everyone in the society to hold as tenants in common or joint tenants in common
    - Problem is that there is no guarantee the money will be used as envisaged or in a shared manner; defeats point of giving money for that purpose and the above case is an example of how this construction can be used
    - A GIFT to persons who are members of the association on the date the gift was made
- Money can be given as a gift on trust for the current members of the association. In ***Re Turkington*** the money given was to build a suitable masonic temple in Stafford. The members of the lodge were both the trustees and the beneficiaries, and so the question to the court was whether a trust had been created at all. Luxmore J felt the gift was a gift absolute more especially as they were trustees and beneficiaries. Fixes the consciences of those involved. Slightly better as it creates an interim trust but still doesn't guarantee the use of the money in the way it was envisaged
    - A gift on TRUST for the present members of the association

Endowment:

- An endowment capital trust intends that the property be locked into the trust so that income derived from the property is paid to the beneficiaries
- Is it possible to say that the trust will last forever? No. the perpetuity rule doesn't allow this to happen. In *Leahy v AG for NSW* land was given to a worldwide order of nuns and the trust purported to give it to the existing members of the covenant as well as the future ones. Gift failed for perpetuity.
    - It can include future members but only up to the point that the purpose can be fulfilled within the period of perpetuity
    - References to ''future members'' are therefore best avoided in trust instruments, unless there is a clear perpetuities provision to specify the time at which future members would cease to be entitled to the trust property

- In *Re Denley* it was held that trust for the benefit of present members of the association would be a valid people trust

Contractual model:

- When somebody gives a society some money, then the society as individuals get to hold the money but do not get to hold it personally subject to the contract that they signed in entering the society. Because one contractually agreed to abide by the rules of the club they do not have the right to take their share of it; allows for people to come and go and this does not affect the money that is held by the club as it is being held subject to a contractual obligation to do whatever the club says

- It was said by **Cross J** in the case of ***Neville Estates v Madden***‘’It may be a gift to the existing members subject to their respective contractual rights and liabilities towards one another as members of that association. In such a case a member cannot sever his share. It will accrue to the other members on his death or resignation it will not now be open to objection on the score of perpetuity or uncertainty unless there is something in the rules of the association which precludes the members from dividing the subject of the gift between them on the footing that they are solely entitled to it in equity.”

    - Essentially saying that a gift can be given to an association (as defined in *Burrell* of having two or more members pursuing a purpose that isn’t business related) then the persons who join are legally and contractually binding themselves to the rules of the club which sets out how exactly money is utilized

        - Money can be given to individual members but get it subject to the rules of the club

        - No one person can do what they want with the money and are contractually bound to doing what the rules of the club say

        - Will not work if there is no such constitution or contractual rules in the club

- The above rationale was followed in ***Re Recher’s Will Trusts*** where a gift was regarded as should being held as a legacy by the society:

    - **Brightman J** held that a transfer to the club could be interpreted as an ‘’accretion to the club’s fund’’ and that it would consequently fall to be administered in accordance with the terms of the club’s contractual constitution, therefore taking the transfer out of the ambit of the beneficiary principle

    - If you have a pot of money, then all the money that comes into the club is put into the pot, subject to the rules of the club which set out what it is the money is to be used for

    - In this case however the gift failed as the society ceased to exist by the time the will was read; everything he said is Obiter but provides clarity as to how the money is held.

- Can be construed as being intended for the benefit of the members

- In *Re Lipinski's Will Trusts* the court had no problem holding valid a trust to an unincorporated association
    - Justice Oliver held there was no question as to validity of gift and gave reasons:
    - Used ***Denley*** principle of indirect human beneficiaries, *Recher* for outright gift to members subject to rule of the club, and *Turkington* where the capital was able to vested in the members of the club as trustees and beneficiaries

- However in *Re Grant's Will Trusts* concerned a constituent party which didn't make its own rules and was subject to wider implications (labour party). The gift Mr Grant left couldn't be regarded as taking effect as the members were not free under their association to dispose of it in any way they wanted as their decision was subject to national executive and annual conference
    - Would fail for perpetuity, same reasons as *Leahy*
    - Couldn't apply in this case as it didn't have characteristics (freedom of members to make contractual rules etc)

When does an unincorporated association cease to exist?

When an unincorporated association is terminated, it may have surplus assets that derive from the members through the payment of subscriptions or from gifts from members or third parties. Therefore it is vital to ascertain when an unincorporated association ceases to exist.

In the case of *Re William Denby& Sons Ltd* four categories were recognised by Brightman J as justifying a finding that an association has ceased to exist:

1. In accordance with the rules of the association
2. By agreement of all interested persons
3. By order of the court
4. When the substratum on which the society was founded has gone, assets become distributable without any order of the court

Methods of distribution:

There are three possible consequences when determining what should happen to surplus assets:

1. Assets may be returned to the people who provided them in the first place
2. The assets may be transferred to the Crown on the ground that nobody owns them – that is they become *Bona Vacant*

3. Assets may be transferred to the members at the time of dissolution

The fate of the money on dissolution follows from the way in which the money was found to have been paid in originally

Resulting trust for donors and members:

- If the gift is given on ‘’trust’’ for a particular purpose and the purpose ceases to exist, this means the proprietary interest in the gift ‘’results’’ back to the original donor
- Follows that the person who gave it did not part out and out with their beneficial interest but only gave it to be used in a certain way and they still retain some sort of interest in it
- A resulting trust can arise when property is held on an express trust that fails, and in these circumstances the property that was held on the express trust will be held on a resulting trust for the settlor
- If the purpose ceases to exist or is no longer capable of being fulfilled then it reverts back to the donor
- This analysis says that where money is given for a purpose which isn’t fulfilled it reverts back
- In the case of ***Re Gillingham*** for example, the question was asked as to what will Happen to the surplus funds
    - **Harmon J** said that where monies held on trust are not exhausted, they will revert to the donor on a resulting trust. The reasoning is that the donor did not part with his money absolutely, out and out, but only under a condition that the purposes declared by the trust should be carried into effect. When this has been done, anything left over, still belongs to him
    - Provides a classic reasoning as to how and why a resulting trust arises
    - It is a form of implied trust given only to be used for a specific purpose
    - Works well where we know who gave the money, however in situations where we don’t know who gave what this will arguably be impossible to put into practice
    - Limited to situations where the donor is identifiable
    - Contract holding theory revolves around how they keep, receive and manage the funds
- Where the trustee was silent as to how to deal with the surplus, the case of *Davies v Richards* illustrates the confusion that arises
    - Concerned a pension fund where the employers and employees contributed 50/50.

- The employers' contributions were regarded as being held on trust in that they gave funds for the purpose of providing funds to pay the pensions. Has the effect that when all is paid up the money will result back to them
- Employees contributions however were regarded as *bona vacantia* as the employees as a group are not analogous with an unincorporated association and they parted with their money out and out. Plus there was the added difficulty of each individual employee being entitled to differing amounts of money, meaning it wasn't possible for them to share the surplus.
- **Scott J** found that contribution of the employers were held on resulting trust whilst the employees money went Bona Vacantia
- What court says is that the employers gave money for the purpose of bolstering the pension trust and should this not happen then they will get what they put in back, but the employees put in their money absolutely thus rendering it Bona Vacantia

- Furthermore, in *Air Jamaica Ltd v Charlton* **Lord Millett** found resulting trusts for both the employer and employee and rejected the notion that just because a party had received what they bargained for that there could be no resulting trusts
  - The facts also concerned a pension fund whereby the employers and employees contributed 50/50
  - Both employers and employees were entitled to share the surplus on a resulting trust analysis
  - The employers followed the approach from *Davies*, however just because the employees had received their pension didn't preclude a finding of a resulting trust. They had contributed to both the fund and the surplus.
  - Held that surplus funds arising from the discontinuance of a pension scheme should be held on resulting trust for the employer and the employees who had contributed to the fund, in proportion to their contributions and regardless of any benefit that they had received from the fund.

A contractual approach?

- Assets are held to belong to the members at the time of the dissolution according to their contractual rights under the rules of the association
- If money is given in return for a consideration, for example money is raised through paying of subscriptions, an annual dinner, or through a raffle, then this is a contract not a trust
- A contractual analysis allows one of two findings:

1) Monies are accretion to club finds which are held by all members of the club subject to the rules *Inter Se*, so shared between members

- Assets held to belong to members at the time of the dissolution according to their contractual rights under the rules of the association, and such rules may set out a

certain method of distribution of the assets upon dissolution and such a method would be binding on the members.

- If no provision is made then there will be an implied term in that the effect of the surplus should be distributed equally between the members at the time of the dissolution

- In the case of *Re Sick & funeral Society* it was said by **Megarry J** that ''the sums they pay cease to be their individual property and so cease to be subject to any concept of resulting trust. Instead, they become the property, through the trustees of the club or association, of all the members for the time being, including themselves.''

    - Felt that membership of a club is a contract
    - If disillusion ensues then division of the property must take place to the exclusion of any former members
    - Where it is a contractual analysis, money is held by all members of a club
    - When the club ceases to exist it becomes their money and should be divided equally
    - Distribution of half shares to children who paid half and full shares to those who paid in full

- *Re Bucks Constabulary* concerned a society for the relief of widows and orphans of deceased members of the Bucks Constabulary. The society's rules were silent as to what should happen to any surplus funds.

    - In 1968 the Bucks Constabulary was amalgamated with other neighbouring constabularies making up the newly formed Thames Valley constabulary.
    - Fund belonged to all present members at the date of disbanding
        - ''the assets must continue to be held simply for the use and benefit of the members.''
    - Held that where property is held by the members it will belong to the members at the time of the dissolution and nobody else will have acquired any other rights in the property, except if other trusts have been validly declared of the property for the benefit of other people, or contractual arrangements have been entered into with others in respect of the property
        - ''the distribution is on the basis of equality because as between a number of people contractually interested in a fund, there is no other method of distribution.''

2) Donor has parted out and out and received what they paid for, so surplus goes *Bona Vacant*

- If the donors of the money do not retain an interest via a resulting trust and if any contractual rights have been satisfied, then who owns the surplus funds? If the

answer is no-one then the funds are claimed by the crown and this is known as *Bona Vacantia*

  - If there is no resulting trust and the court finds for whatever reason that you got what you paid for, then the money may be found to not belong to anyone and may go to the crown

- Where property is ownerless, it will be considered to be *bona vacantia* and will be transferred to the crown

- Once it has been recognised that property couldn't be held on resulting trust because the members had parted with their proprietary rights to the money paid, the case of ***Cunnack v Edwards*** showed that in such a situation where it is not possible to identify who transferred the property to the association and so upon the association dissolving it is impossible to be transferred back; *bona vacantia* comes into play.

  - In the case, all the members are deceased and no-one is left to pay out. A surplus of £1,250 remained

  - ''as the member paid his money to the society, so he divested himself of all interest in this money forever''

  - Money goes to the crown due to the lack of ownership

- In ***Hanchett-Stamford v AG*** there was an unincorporated association and one person was left; court said she was entitled to the fund and wasn't given Bona Vacant

  - As long as some owner can be established then the funds will not be given to the Crown

- The case of ***Re West Sussex Constabulary*** takes a different approach to ***Re Bucks*** in that is sought to distinguish between the different means money was raised to determine how it would be distributed

  - 1) members subscriptions: the donors had got what they bargained for, the benefits of membership, the court followed ***Cunnack v Edwards*** and subs were given for the benefit of the widows not of the subscribers

    - So, *Bona Vacantia*

  - 2) receipts from entertainment: donors received consideration in the form of prizes etc, this money did not go directly into the fund as prizes etc had to first be bought out of money raised. The court thought that the subs might not even have contributed to the surplus and could have been used up

    - Still ownerless and so, *Bona Vacant*

  - 3) collection boxes: doubted what had been said in ***Re Gillingham***. Money would be regarded as having been parted with out and out and therefore there would be no resulting trust.

        - *Bona Vacantia* due to lack of identifiable owners
    - 4) donations and legacies: money given for a purpose on trust and will result back to donors or their estates
        - Resulting trust analysis should be used here

PUBLIC PURPOSE TRUSTS - CHARITIES

A big exception to the rules preventing purpose trusts from being valid is where the trust isn't private but is deemed to be a public purpose trust and therefore is afforded the status in law of being charitable and valid

A charity is an institution that is established exclusively for charitable purposes and is subject to the jurisdiction of the High court which has the effect that they charity must be established under English law even though the charitable purpose is to be fulfilled abroad.

Purposes of Charities were generalised and modernised in the case of *Commissioners for Special Purpose of the Income Tax v Pemsel* by Lord Macnaghten into 4 categories:

1. Relieve poverty
2. Advance education
3. Advance religion
4. Otherwise benefit the community

Trusts for public purposes:

- Trusts held to be of such value to the community that they receive special treatment
- In *Gaudiya v Brahmachary* it was said how charitable trusts can usefully be characterised as public trusts since they promote purposes beneficial to the community
- They do not offend the beneficiary principle due to the fact they are for the community and for the public good
- Are enforceable by the Attorney General

Not all charities are trusts:

- Company limited by guarantee: May be structured like a company but individual directors etc do not take salaries, dividends or profits as they are a charity
- Unincorporated association: Unincorporated associations established under the charities act 2006 and takes charities out of the company law field
- Charitable incorporated organisation

Charities Act 2011 and the Charity Commission determine if a body is to become charitable:

- Whether any particular purpose will become a charitable purpose is a question for the commission as well as the courts
- This is an important question whether a particular purpose can be charitable for the purposes of the law as charitable trusts enjoy immense trust and tax privileges; if you wish to set up a purpose to pursue a charitable claim

Whatever mechanism is used to effect a charitable purpose, an institution can be considered to be charitable only if three conditions are satisfied:

1) It must be established for a purpose that the law regards as charitable
2) Its purposes must benefit the public or a sufficient section of the public
3) It must be wholly and exclusively charitable

Privileges of charitable trusts

Trust privileges:

- Enforced by the Attorney General
- Purpose must simply be a ''charitable purpose'' and whilst it isn't defined with great precision it is a prerequisite that the purpose be wholly and exclusively charitable
    - In *Chichester v Simpson* ''charitable or benevolent objects'' failed to be held as exclusively charitable. Benevolent was interpreted as being much wider than charitable; to say charitable or benevolent meant it could be used for some purposes the law recognised as being charitable
        - Must be a purpose recognised by the law as being charitable and exclusively charitable
- On the issues of perpetuities, court is reluctant to allow money to be tied up indefinitely and the money needs to be able to be vested in one person who would be able to claim the money; charitable trust however may exist forever without falling foul of perpetuity. Some exceptions to limit that they cannot vest in too remote a time in the future are

- Rule against perpetual duration has no application. Except in two instances, the rules against ‘’remoteness of vesting’’ apply
- Wait and see rule says the gift will not immediately be void and the law will allow us to wait and see if the thing to happen in the future does or does not happen
- Charitable unities rule. In *Christ Hospital v Granger* says that a gift over from one charity to another will still be valid even if the second gift takes place at a later date. Once deemed to be charitable the perpetuity rule is relaxed. If it moves from one charity to another it doesn’t matter if this takes a period longer than that allowed by perpetuity

- Where a charitable trust fails initially or subsequently, it may be necessary to establish a *Cy Pres* scheme where the charity is used for another similar purpose. *Cy Pres* means as near or as close to the original charitable purpose
  - In some circumstances when a charitable gift fails, instead of lapsing, the gift may be transferred to a closely related charitable purpose. This is in general, crude, language a description of the *Cy Pres* principle
  - Court may be able to pass it on to an already existing and similar charitable purpose
  - Advantageous in the sense that the creator of the trust and donors to it will know that once property has been received by that trust, it will be used for charitable purposes, even if the particular trust faisl
- Shows how court has a generous approach to charitable purposes
  - The law deems these trusts, because they are for the benefit of the public, to be very important
  - Political angle in that many charities support/supplement the job of the state in providing certain services
- This area is now governed under part 6 of the charities act 2011

Tax privileges:

- One of the main reasons creators of the trust will want it to be charitable is due to the significant tax advantages that result from this for both the charity and donors to it
- Exempt from tax on income, rent, dividends and profits. Also exempt from corporation tax and capital gains tax as long as the individual directors are not taking profits
  - Massive financial incentive for trust to be charitable
  - Should be viewed as a direct subsidy from the state; we pay taxes so they don’t have to

    - Courts are not blind or unaware of this privilege when they are asked to consider if a particular trust is for a charitable purpose or not

- May recover basic rate tax when money donated under a covenant
- Exempt from inheritance tax
- Exempt from stamp duty
- Individuals can benefit from' gift aid'
- Where charities trade – reduction in council tax
- In ***Dingle v Turner*** Lord Cross stated how trusts enjoy different privileges and when deciding if a trust is charitable, the court is endowing it a substantial annual subsidy at the behalf of the tax payer and this attracts financial privilege and only certain charities should enjoy fiscal privileges. Two elements to this area:
    - 1) Purpose must be charitable within meaning of the law
    - 2) Even if it is recognised as being charitable the second requirement is that the purpose provides a public benefit. This requirement is directly connected to these privileges; if tax payers are subsidising these charities then it is important that they give back to the public
    - Question of whether a trust is so good that it is deserved of privileges

Is the trust for charitable purposes?

The Statute of Elizabeth/Charitable Uses Act 1601 states:

- The relief of aged, impotent and poor people; the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities, the repair of bridges, ports, havens, causeways, churches, seabanks and highways; the education and preferment of orphans; the relief, stock or maintenance for houses of correction; the marriage of poor maids; the supportation, aid and help of young tradesmen, handicraftsmen, and persons decayed; the relief or redemption of prisoners or captives; the aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes''
- Hudson feels one of the main purposes of the 1601 act was to alleviate the parishes of the burden of looking after the poor and paved the way to provide a framework for philanthropic assistance.
    - Were many issues which preoccupied the state in 1601
    - Were re-enacted in the Mortmain and Charitable Uses Act 1888

In the case of *Commissioners for Special Purpose of the Income Tax v Pemsel*the issues were broken down into 4 categories. In doubt if the purpose is charitable for the purposes of law. Showed 3 specific services and a fourth broad category encapsulating general beneficial purposes; accepted as heads of charity:

1. Relief of poverty

2. Advancement of education
3. Advancement of religion
4. Any purpose which was beneficial to the community

Lord Wilberforce in *Scottish Burial Reform Society v Glasgow CC* said that since it was a classification of convenience there may be purposes which don't fit in neatly with above categories and that the law of charity is a moving subject which may have evolved since 1891. These 4 heads have subsequently been interpreted pretty broadly and it was said they should not be read as a rigid list

Prior to the Charities Act 2006/11 a benefit to the public was almost always presumed to exist under poverty education and religion. Legal definition required an element of public benefit:

- Understood as meaning that the purpose must entail a tangible benefit for the public at large or a specific portion of the public
- Under the first 3 heads, once the trust had been accepted as being for a charitable purpose, it was automatically presumed it would provide the requisite public benefit; was very often intertwined

The charities act 2006 is now consolidated in the Charities Act 2011 which sets out requirement in relation to the meaning of charitable purposes and gets rid of any presumption that any purpose is now automatically for the benefit of the public.

Section 2 is in relation to the meaning of ''charitable purpose:

- (1) for the purposes of the law of England and Wales, a charitable purpose is a purpose which
    - (a) falls within s3(1) and
    - (b) which is for the public benefit (see section 4)
        - We now have more expansive list; 4 heads have now been turned into 13
        - Any purpose which before the 2006 act had been deemed to be a charitable purpose will continue to be one even if it isn't listed in one of the 13 categories; new heads cover the sorts of things in more explicit detail

Section 4 is the purpose for the public benefit?

- (2) in determining whether that requirement is satisfied in relation to any such purpose, it is NOT to be presumed that a purpose of a particular description is for the public benefit
    - Statutory statement that excludes any presumption that a purpose is for a public benefit; any organisation trying to achieve charitable status must now prove it is for the public benefit

- (3) in this Chapter, any reference to the public benefit is a reference to the public benefit as that term is understood for the purposes of the law relating to charities in England and Wales
    - Shows that any purpose as to the understanding of a public benefit is through reference to the previous law; in understanding what public benefit means you must look back at previous case law to see how such a concept has been developed
- Statute removes presumption of 'public benefit'
    - Statute however doesn't provide a definition of a public benefit but part 2 section 17 requires guidance to be issues and the starting point is existing case law
    - Charities Act 2011 Part 2 s 17 requires Charity Commission to issue guidance

The Heads of Charity

Section 3(1)(a) Prevention or Relief of Poverty:

- Is this an absolute or relative standard?
    - Martin states that if the purpose of the trust isn't enough to justify the use of public money, should it justify the use of subsidised held by and given to a charity?
    - In ***Re Coulthurst*** it was stated how poverty is a word of wide input. Lord Evershed said ''poverty doesn't mean destitution having to go short.''
        - It encompasses but isnt confined to complete destitution
    - Charity commission provided a certain definition of poverty which conforms to modern developments and understandings. This definition is quite wide and generous. Poor means ''anyone who doesn't have access to the normal things in life which most people take for granted''
        - Prevention of poverty ''preventing persons who are not poor from becoming poor. So organisations that offer financial advice or debt management advice would qualify.''
            - Could include debt management agencies
    - ***Re Drummond*** money was left to provide contribution to holiday expenses of work people employed in a spinning department of a mill in Yorkshire. The work people concerned were upwards of 500 women earning less than £1 a week
        - Court held they were not poor and the gift failed as a charitable purpose and the court said the poor need not be poor in the sense of the class but in terms of work.
- Inferring the intention to aid the poor, from the language of the gift and other circumstances:

- In *Re Niyazi's Will Trusts* a testamentary gift to construct a working men's hostel in Cyprus was held to be charitable by Megarry J because ''hostel'' suggested modest accommodation for working men of relatively low income who were in temporary need

- However, contrast the above case with *Re Sanders* where a trust to provide ''dwellings'' for the ''working class'' has been held not to be charitable because there was no requirement of being poor to benefit from it.

- Must not benefit the rich:

  - A trust for the relief of property must not, even inadvertently, benefit rich people. In *Re Gwynon* a fund providing gifts for boys in Farnham failed as it didn't exclude the rich people

- Trusts must relieve poverty:

  - In the *Joseph Rowntree Memorial Trust v AG* which concerned drawing a distinctive line between the poor, it was held that the charging of fees per se doesn't preclude a finding that a purpose is a charitable purpose

    - The trust wished to build small self-contained houses for older people on long leases at a 30% discount on the market price. The people who could benefit from this also had to be able to pay a service charge but did have to be at least in need of that type of accommodation

    - Even if one of the tenants did win the lottery this wouldn't preclude in them losing their accommodation.

    - In court of appeal Gibson LJ looked in the preamble in 1601 and felt that aged people were included and this scheme would satisfy finding charitable status. These aged people were a charitable class and any benefit that accrued with them wouldn't defeat the underlying charitable purpose in this status. Not defeated by the fact that people may have to pay something towards receiving that.

    - Charging of fees is not a bar towards finding a purpose as being charitable

- Also contained in section 3(1)(j), the relief of those in need by reason of financial hardship or other disadvantage

Section 3(1)(b) Advancement of education:

- Advancement of education, and under section 3(1)(f) we have the advancement of arts, culture, heritage and science

- Not limited to formal education – instruction, cultural advancement, industrial and technical training, zoos, museums – also covers research

- Charity Commission examples – educational prize funds, student unions, training for the unemployed, physical and out-of-school education

- This head covers education, training and research in specific areas of study and expertise, and broader education in the development of individual capabilities, competences, skills and understanding. As said by the Charity Commission

- Charging fees is not a bar on finding a charitable trust, as long as the school isnt operated for a profit
    - Individuals cannot take a profit as this will deprive the private school of charitable status. In *Re Girls Public Day School Trust* the company pledged to never take the dividends, but fact their constitution allowed them to do so meant it was ruled out from being a charitable institution. However in *Abbey, Malvern and Wells* they did gain charitable status

- *Incorporated Council for Law Reporting in England and Wales* had to ascertain if the council could be a charitable purpose; publication was held to be a benefit for the advancement of education despite the fact that only lawyers would use them and these facilitate them in earning their living
    - Education isn't just about the acquisition of knowledge and education but also about dissemination (the act of spreading something).
    - Courts took a broad understanding and approach
    - However can we say that the publication of law reports is for the public? This didn't however defeat the fact it was for the purpose and advancement of education.

- In regard to research, that which is likely to benefit the community is highly likely to be regarded as charitable.
    - However in *Re Shaw v Day* the gift failed to be charitable. The idea of private contemplation not being disseminated would mean it highly unlikely for such research to be regarded as charitable
        - "the research enjoined by the testator seems to me merely to tend towards the increase of public knowledge, there is no element of teaching or education…" per Harman J
    - The case of *Re Hopkins* contrasts with the above case. Money was left to the Francis Bacon society to be used to search for manuscripts believed to be written by Francis Bacon as opposed to Shakespeare. This discovery of manuscripts would be of the highest regard to literature and history and was held by Wilberforce J to amount to a charitable purpose.
        - Shows wider and more flexible view than the above case
        - Wilberforce J said that "Research must either be of educational value to the researcher or must be so directed as to lead to something which will pass into the store of educational material or so as to improve the sum of communicable knowledge in an area which education may cover – education, in this last context extending to the formation of literary taste and appreciation"

- However it is questionable if it is merely a matter of a value judgment of the trust in the eyes of the court

- In *McGovern v AG* Slade LJ's discussion on research is interesting

Section 3(1)(f) Advancement of Arts, Culture, Heritage or Science:

- In *Re Shakespeare's Memorial Trust*, a fund to establish a theatre for Shakespeare's work was held to be educational

- In *Re Choral Society* Lord Greene rejected a narrow meaning of educational purposes. This was relied upon in *Re Shaws WT* which was done for the promotion of the education of the Irish

    - Lord Greene said "A body of persons established for the purpose of raising the artistic state of the country is established for educational purposes, because the education of artistic taste is one of the most important things in the development of a civilised human being."

    - Shows a generous approach being taken by the court

- *Re Delius* concerned a composer's widow who left her estate for the advancement of the musical talents of her husband. The courts accepted the high standard of the composer's work and the promotion of his work was indeed charitable. However it was contemplated if music of an ''inadequate'' composer would be treated in the same way.

    - In deciding if this purpose was for the advancement of education, could this merely have been another valued judgment

- Some antique furniture and silver was left by Arthur Watson Hyde in the case of *McGovern v Attorney-General*to the national trusts and if they didn't want it he left it to his testators to use so as to make a museum. Need to decide if this collection of paintings etc was of any value to the public and was for the advancement of either education or arts etc.

    - To avoid the court having to make an open value judgment the court employed an expert to evaluate the collection; held that parts of the collection was atrociously bad and the whole collection had neither artistic or educational merit

    - In receipt of this evidence it was held to not gain charitable status

- Charity commissioners have said that this head would cover a wide range of terminology

    - Including promoting various forms of art at a national/professional and local/amateur level. ''Art'' is to include abstract, conceptual and performance art and representational and figurative art. Advancing heritage would include charities for the preservation of historic land and buildings and could also include preserving or maintaining traditions. The advancement of science is to include scientific research and charities connected with learned societies and institutions.

- Helps us envisage what is workable under such a head

Section 3(1)(g) Advancement of Amateur Sport:

- Sport per se isn't a charitable purpose as made clear in the case of ***Re Nottage***
  - In ***Re Nottage*** a trust to provide funds for yachting was not a charitable trust and such a pursuit was not recognised as a charitable purpose
  - Actual playing of a particular sport is not a charitable purpose and historically this heading would have worked with education where the sport was attached to a school of university it was regarded as education
  - Trust for the promotion of football for its own sake, for example, is not charitable historically or even in the present
  - However in ***Re Dupree's Trust*** chess was held to be more than a mere game and so was held to be a charitable purpose
    - Statement that a mere playing of games was not a charitable purpose
  - In ***IRC v McMullen*** the House of Lords eventually allowed a trust for football to be charitable
    - Allowed a trust for the promotion of playing of sport but again reiterated notion that mere playing of games was not charitable; bringing together exercise and skill meant the totality warranted charitable status
    - "While the mere playing of games was not charitable; nor necessarily educational, the totality of the process of education consisted in a balance between spiritual, moral, mental and physical elements and did not exclude pleasure in the exercise of skill" Lord Hailsham
- Charity Commission NOW recognise as charitable the promotion of community participation in healthy recreation by providing facilities for playing particular sports…
  - Even under the 2011 act the charity commission notes that the law doesn't regard a particular sport on its own sake as charitable but they recognise certain charitable exceptions
  - Sport in question must be capable of improving physical health and fitness
    - The sport must be capable of improving community health and fitness and list a number of sports which are not capable of doing this
  - Club must have open membership, i.e. genuinely available to anyone who wishes to take advantage of them

        - Playing of the game per se is not charitable but a trust which promotes community participation in healthy recreation is charitable and some sports will fall in this ambit

        - If you are involved in the community in physical recreation promoting physical recreation and wellbeing, these purposes can indeed be charitable if

Section 3(1)(c) Advancement of Religion:

- This used to be one of the old heads but it is now contained in statutory form
- Case law has developed to show tolerance and diversity to show if a purpose advances religion
    - Broad understanding of how purposes can fit under this
- In *Neville Estates v Madden* shows how the law isn't to make a valued judgment if one religion is better than another but presumes that following some faith is better than no faith
    - Lord Cross said ''as between different religions, the law stands neutral, but it assumes that any religion is at least likely to be better than none.''
- There are limits to generosity however
    - In *Gilmour v Coates* money was settled for a group of cloistered nuns and the question was whether their activities was charitable; it failed because they had to show that their activities benefitted society and couldn't demonstrate the requisite public benefit
        - If the court accepted they would be making a leap of faith; not for the law to say if religious activity benefits the community
    - The above case contrasts with *Re Hetherington*
- As for how misguided/outrageous or bland a belief can be:
    - In *Thornton v Howe* the court acknowledged the birth of the second messiah as still charitable despite being deluded etc
        - Romily MR said "The court makes no distinction between one religion and another or one sect and another unless the tenets of a particular sect inculcate doctrines adverse to the very foundations of all religion and are subversive of all morality. If the tendency were not immoral and although this court might consider the opinions sought to be propagated foolish, deluded and confused or even devoid of foundation – the trust will nevertheless be charitable."
    - *Re Watson* the court held that following Romily's words above, they found a trust to be charitable for the propagation of works relating to Christianity
- The Charity Commission states "the advancement of religion includes many different faiths and belief systems, involving faith in one Supreme Being or many or none including Christianity, Judaism, Islam, Hinduism and Buddhism…"

- Most applications start with the charity commission who decide if your purpose is charitable or not

- Once established as a religion, any organisation must advance that religion
- The *Church of Scientology* case led to an important decision by the Charities Commission which set out four criteria:
    1. Did the adherents have a belief in a supreme being?
        - Concept of supreme being is stronger than a single figure of God; the Church did believe in it
    2. Did the adherents worship the supreme being?
        - Worship they said would be acts of submission, veneration, intercession etc; not possible to worship an ethical or philosophical ideology and Scientology was held to equate to therapy and thus they held there was no element of worship for the Church
    3. Does the organisation advance the religion?
        - Advancing the religion asks if the Church was established to uphold moral or spiritual welfare of society, but given their limited access to the public it was held they did not satisfy this element
    4. Is the organisation established for the public benefit?
- *Neville Estates v Madden* showed how a synagogue could be seen as having a public benefit as in theory the doors would be open to the public
- In *Re South Ethical Place* Dillon J explained how religion was concerned with a man's relation with God whilst ethics are concerned with man's relation with man; put some limits of what the law will understand as being the pursuance and observance of religion
- In *United Grand Lodge of Freemasons* a simple belief in a divine spirit coupled with a purpose which demanded the highest social and domestic standard was held to not constitute religion
- *Funnell v Stewart* money was left to continue faith healing and spiritual work was held to be a charitable purpose and for the public benefit
- Section 2(1)(a)(i)(ii) of the Charities Act 2011 states how religion includes belief in more than one God, and religion which doesn't involve belief in God

Section 3(1)(m) Other purposes beneficial to the community:

- Prior to the Charities Acts 2006/11 this was originally the 4th charitable head
    - Many of the purposes which would have fitted in under the 4th head are now contained in this

- Previously you had to show the purpose was analogous to the list or analogous to existing case law and in ***Williams Trustees v IRC*** this was reiterated by Lord Simmons
    - "it is still the general law that a trust is not charitable unless it is within the spirit and intendment of the [1601] preamble"
- The charity commission after the 2006/11 Acts envisage a large number of purposes which would now fall under this head
    - For example, the provision of public works/public amenities; the relief of unemployment; the promotion of agriculture and horticulture; the promotion of mental health or moral improvement; promoting the sound administration and the development of the law

Section 3(1)(d) Advancement of health or the saving of lives:

- The charity commission stated how this is about ''the prevention or the relief of sickness, disease or human suffering, the promotion of health. This includes conventional, alternative and holistic methods concerned with healing mind, body and spirit, alleviation of symptoms and cure.''
    - Charity commission showed it is not limited to traditional scientific methods and provides quite a generous interpretation but there needs to be some evidence of the efficacy of the use
- In the case of ***Re Resch's WT*** a gift for the purpose of a hospital is, prima facie, a good charitable gift

Section 3(1)(e) The advancement of citizenship or community development:

- Stated by the charity commission how this covers a broad group of ''charitable purposes directed towards support for social and community infrastructure which is focused on the community rather than on the individual''
    - Good citizenship award schemes
    - Urban and rural regeneration
    - Promotion of volunteering
- As there is no law, we resort to such guidance which states how it applies to a broad group

Section 3(1)(h) Advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality or diversity:

- Historically the law of charity has been clear that where a purpose is principally political or which campaigns for a change in the law, it will not be a charitable purpose
- As it has been made clear, all charities must provide a public benefit, and sometimes it is difficult to ascertain if a certain political purpose is actually for the benefit of the public

- Courts have said that if a purpose which purports to be charitable and seeks a change in the law, this is a matter for politicians and not one for the courts
- Demonstrated a traditional hands off approach for purposes which seek political change

- In regard to political purposes:
  - In *National Anti-Vivisection Society* they sought charitable status and failed. One of their aims was to repeal the cruelty to animals act and wanted a ban on animal vivisection. A judge held that such a ban would be more harmful to the public if anything
  - In *McGovern v AG* a trust was set up to relieve human suffering and distress, and this was held by the court to be capable of being charitable. But if the direct and main object of the trust was to seek change in other countries, then it would have political undertones and so wouldn't be regarded as charitable
  - In *Wolf Trust* the trust for wolves was not established for exclusively charitable purposes as promoting reintroduction of wolves in Scotland was not entirely charitable as the court would be unable to judge if such a change is for the public benefit or not

- Charity commission has said that charities are able to engage in political campaigning in order to further their charitable purposes; distinction between political purposes which are not valid and political activity which may now be valid
  - Examples of monitoring human rights abuses, research into human rights issues, educating the public on human rights, commenting on proposed human rights legislation
  - An organisation which promotes human rights through affecting government policy etc, has in part political purposes and so cannot be a charity. However the trustees of a charity may use political means without compromising charitable status
  - Therefore political means must therefore not be an overwhelming means by which the charity seeks to achieve its purpose
  - Trustees can use political activity to achieve certain means
  - As long as purpose isn't political then it is alright

- The means of activities undertaken by trustees may have political involvement and have political nature, but as long as the purpose per se is not political they will still be regarded as charities
  - Charity commission states '' charities are able to engage in political campaigning in order to further their charitable purposes. Charity law draws a distinction between political purposes and political activities. An organisation which has purposes which include the promotion of human rights by seeking a change in the law, or a shift in government policy, or a

reversal of a government decision has (at least in part) political purposes and cannot be a charity''

    - Charities are able to indulge in political activities to further their purpose so long as they further the charity to the extent of the resources not dominating the purposes

    - Lists purposes which would be regarded as charitable above

- Conflict resolution or reconciliation under this head is described by the charity commission as including the relief of suffering, poverty and distress arising through conflict; national or international, by identifying the causes of conflict and by seeking to resolve it

- Promotion of religious or racial harmony or equality and diversity would include purposes which aim to lessen conflict between people from different races, religions or belief systems – eliminating discrimination and promoting diversity in society

Section 3(1)(i) Advancement of environmental protection or improvement:

- Charity commission states this brand new category is to do with ''preservation and conservation of the natural environment'' which could include plant species, areas of land etc.

Section 3(1)(j) Relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage:

- Said by the charity commission that this was in regard to charities concerned with the care, upbringing or establishment in life of children or young people, for example care homes, apprentices. Charities concerned with the relief of the effects of old age, eg specialist advice, drop-in centres, equipment or accommodation. Charities concerned with the relief of disability.

- In the case of ***Rowntree Memorial Trust Housing Association*** it was confirmed that the relief of aged people didn't require them to be poor but that there had to be a need that was attributable to their age and that the charity sought to relieve, namely the provision of suitable accommodation for old people, with communal services and a warden.

Section 3(1)(k) Advancement of Animal welfare:

- In ***Re Wedgewood*** it was said by Swinfen-Eady LJ that this was in regard to ''trusts to promote and encourage kindness towards animals, and to ameliorate the condition of the brute creation, and thus to stimulate humane and generous sentiments in man towards lower animals, and by this means to promote feelings of humanity and thus elevate the human race''

    - General idea was that if humans were kind to animals, it would make us better humans

- If we provide sanctuaries for animals in which humans are not allowed in, then the purpose may not be charitable as there would be no benefit to the public. Sanctuary for animals on their own is not charitable, must have human relation

- Charity commission has said that animal sanctuaries could now be charitable but must always show a public benefit
    - ''charities that prevent or suppress cruelty to animals, that promote kindness to animals, that provide veterinary care and treatment that care for or re-home abandoned or mistreated animals and even feral animal control such as neutering''

Section 3(1)(l) Promotion of the efficiency of the armed forces of the crown, or the efficiency of the police, fire and rescue services or ambulance services:

- Charity commission gave the example of the provision of educational resources, provision and maintenance of band instruments, provision of memorials and chapels, researching military history, military museums, encouraging esprit de corps, and encouraging recruitment
- *City of Glasgow Police Athletic Association*
- Got some common law which gives examples as to what will fit here, as well as guidance by the charity commission

Purpose must be exclusively charitable

In addition to finding that a purpose fits within one of the charitable heads, we must look to see if the purpose is exclusively charitable. Usually if there is some part of the truth purpose that is non-charitable, the whole trust will fail. This requirement has existed in the old law and is retained in section 1(1)(a) of the Charities Act 2011 stating

- For the purposes of the law of England and Wales, ''charity'' means an institution which – is established for charitable purposes only..

Where you have a disjunctive (''or'') it means the trustees can use the money for purposes not deemed charitable by the law, as in *Chichester Diocesan Fund v Simpson*

In *AG of the Bahamas v Royal Trust Company*the word welfare was considered too wide to be charitable. Words like benevolent or welfare could be fatal to a trust as they could include purposes which aren't charitable, and so does not demonstrate exclusivity

However, a generous interpretation of a trust by the courts could save it and regard it as charitable, as seen in *Re Coxen* where the gift as a whole was regarded as charitable despite two of the 3 purposes were clearly not charitable

Where a trust can benevolently be interpreted as being confined to charitable purposes within the identified locality, then following the case of *AG of the Cayman Islands v Wahr-Hansen* such trusts would be regarded as valid charitable trusts, even though trusts for the benefit of a particular locality would on the outset seem to not be exclusively charitable

The ''public benefit'' requirement

Need to ask yourself in every problem question to do with charity if

1) Is it a charitable purpose?
2) Is it exclusively charitable?

3) Does it provide a public benefit?

This aspect removes the presumption that every charity has a public benefit

- Any purpose which had as its purpose the relief of poverty would always be given charitable status

Section 4 of the Charities Act 2011 states, in regard to the ‘’public benefit” test:

- (1) ”the public benefit requirement” means the requirement in s 2(1)(b) that a purpose falling within s 3(1) must be for the public benefit if it is to be a charitable purpose
- (2) in determining whether the public benefit requirement is satisfied in relation to any purpose, it is not to be presumed that a purpose of a particular description is for the public benefit
- (3) in this Chapter, any reference to the public benefit is a reference to the public benefit as that term is understood for the purposes of the law relating to charities in England and Wales
- (4) subsection (3) is subject to subsection (2)

The charity commission laid out 2 principles in regard to guidance

1) There must be an identifiable benefit(s)
    a. It must be clear what the benefits are
    b. The benefits must be related to the aims
    c. Benefits must be balanced against any detriment or harm
2) Benefit must be to the public, or section of the public
    a. The beneficiaries must be appropriate to the aims
    b. Where benefit is to a section of the public, the opportunity to benefit must not be unreasonably restricted (by geography or ability to pay fees)
    c. People in poverty must not be excluded from the opportunity to benefit
    d. Any private benefits must be incidental

- This second criteria has caused a great degree of controversy due to the wide manner in which certain institutions have been regarded as having a public benefit. Under previous case law, the test for public benefit varied from head to head.

Public benefit and the relief of poverty:

- Poverty has always been a special charitable head; fact it relieves poverty meant it was charitable regardless of the size of the group it was benefitting
    - Long history of valid charitable purposes which are for the alleviation of poor persons

- However this was taken advantage of by the wealthy on some occasions

- In *Re Scarisbrook* an exception was demonstrated to the general rule and operated whether the personal tie was one of blood or one of contract

  - ''an aggregate of individuals ascertained by reference to some personal tie, e.g. blood or contract, such as the relations of a particular individual, the members of a particular family, the employees of a particular firm, does not amount to the public or a section thereof…"

  - Jenkins LJ went on to say that ''there is however an exception in that trusts or gifts for the relief of poverty have been held to be charitable even though they are limited in their application to some aggregate of individuals ascertained as above. This exception operated whether the personal tie is one of blood, or of contract, or amongst employees of a particular company. This exception cannot be accounted for by reference to any principle, but is established by a series of authorities and must be accepted as valid…"

- And in *Re Segelman* a trust which gave discretion to the trustees to distribute money to the poor and needy who were 26 relatives of a millionaire was held to be charitable; held to benefit the public regardless

  - Fact that despite this actually being a private trust, as it was set up as being for the relief of poverty it was afforded charitable status and all the benefits that go with it

- In *Dingle v Turner* Frank Dingle left the residue of his estate on trust to pay pensions for poor employees of his company. Leaving money on trust to relieve the poverty for people who cannot work for physical or mental infirmity; still a nexus in the sense they have to be employees of his company

  - Held by Lord Cross that cases for ''poor employees'' was a natural extension of the ''poor relations'' cases, and that to draw a difference between similar types of poverty would be illogical

  - Trust was held to be charitable

- In *AG v Charity Commission for England & Wales* it was stated that a public benefit in the first sense be established; nature of purpose itself must be such to be a benefit to the community. So the relief of poverty per se is a benefit to the public and the 2011 act has not changed this. Tribunal was clear that the legislation did not affect the relief of poverty, even if the potential beneficiaries are a small number of relations or employees etc

  - Trust for relief of poverty remains to be special and will satisfy the public benefit requirement

Public benefit and the advancement of education:

- There are cases where testators have tried to establish charitable trusts in situations where beneficiaries are in some way related to the settlors.

- In *Re Compton* the gift was for the advancement of education but the beneficiaries were three named relatives of the testator.
    - Lord Greene said that ‘’on principle, a gift under which the beneficiaries are defined by reference to a purely personal relationship to a named propositus cannot be a valid charitable trust’’
    - In relation to the advancement of education, the reason for poverty is not accepted in this case
    - If you leave a trust for the advancement of education for relatives or employees it will not satisfy the public benefit requirement
- In *Oppenheim v Tobacco Securities Trust*money was to be applied for the education of employees and ex-employees for the tobacco company, and this was a huge class (around 10,000) but question if it was a section of community. Lord Simmonds said that whether class of persons can be regarded as a section of the community to satisfy public benefit depends on the possible beneficiaries not being numerically negligible
    - It would be an extension (referring to poor relations) into education for which there is no justification or authority. Must not be forgotten that charitable institution enjoy rare privileges
    - Court is quite open about the fact that it recognises that when making decision to grant charitable status, they grant huge financial benefits to the person for whom it is being granted
    - No justification for extending dictum in poverty cases to cover education ones
    - What Lord Cross said in *Dingle v Turner* is of great significance in that it must be clear to distinguish between a public purpose and a company purpose
        - The fiscal privileges were a strong influence on the court in this case
- Lord MacDermott dissented in the same above case of *Oppenheim*:
    - Gave example of trust for the example of trust for education of railway workers in the UK, this would satisfy the public benefit test, but if it was made for workers of british rail (who were at the time the only place which railway workers could be employed) the trust would fail for not being charitable
    - Said line that whether there is a personal nexis (meaning it cannot benefit the public) is not always easy to distinguish
- In relation to advancement of education, there are clear policy reasons why the arguments which succeed for poverty should not do so in such cases
    - Personal nexus in the advancement of education

- Where the nexus exists through employment this is regarded as not being a sufficient section of the public
- Where the nexus exists through personal or family ties this is not a sufficient section of the public but a class may be preferred if that class is in itself a section of the public

- Does advancement of education apply to situations where you have to pay for the education? Issue as to whether an independent fee paying schools can now satisfy the requirement of proving their public benefit
  - Historically fee paying schools have been held to be charitable. This was recently address in ***R(ISC) v CC for England & Wales*** where the ISC sought an order of the court quashing the guidance issued by the charity commission.
  - Even if an organisation excluded the poor, it could still be a charity as long as there is some effort to include the poor
  - Fee paying schools are okay but the personal nexis will defeat the charitable status

Public benefit and the advancement of religion:

- Historically this aspect has been fairly easy to satisfy
- Courts have taken a generous and non judgmental approach to religion
  - Cases such as ***Thornton v Howe***, ***Re Watson***, ***Neville Estates v Madden*** and ***Funnell v Stewart*** demonstrate this aspect
- Justice Cross felt the public had something to gain from going to places of worship and mixing with their fellow citizens
- The church of Scientology rationale however could be policy based as opposed to legally based

Public benefit and other purposes beneficial to the community:

- There has never been a presumption of public benefit in this area
- It was said in ***IRC v Baddely*** by Viscount Simmonds that ‘’if a charity falls within the fourth class, it must be for the benefit of the whole community or at least all the inhabitants of a sufficient area.” “A bridge which is available to all the public may undoubtedly be a charity and it is indifferent how many people actually use it. But, confine its use to a selected number of persons, however numerous, it is then clearly not a charity.”
  - A trust for persons resident in West Ham or Leyton who were likely to become members of a certain church was regarded as non-charitable

Public benefit and the Charities Act 2011:

- Charity commission has said there are two principals involved in assessing a public benefit

- Charging of fees per se may not be a bar in finding a purpose to be charitable
    - Gift for the purpose of hospital would be a prima facie charitable gift
    - In *Re Resch's WT* it was said that ''disqualifying indicia may be either that the hospital is carried on commercially for profit or that the benefits are not for the public''

Charity commission on fee charging:

- In regard to the paying of fees, it was just necessary that the poor were not excluded; whilst the hospital did charge fees, such a charge were sliding depending on your financial circumstances
- In *Scottish Burial Reform and Cremation Society* it was said by Lord Reid that ''it has never been held that objects, otherwise charitable, cease to be charitable if the beneficiaries are required to make payments for what they receive''
- *R (on the application of ISC) v Charity Commission* it was said by the Charity commission that there is no objection in principle for the charging of fees for services by charities

Recreational purposes: Recreational charities Act 1958 now section 5 Charities act 2011

- In response to the decision in *IRC v Baddeley* this act was passed so as to clarify the law
- S 1(1) the provision of facilities for recreational or other leisure time occupation will be charitable if:
    - the facilities are provided in the interests of social welfare
- S 5 (2) to satisfy the social welfare requirement – two basic conditions
- S 5 (3) the basic conditions are:
    - (a) that the facilities are provided with the object of improving conditions of life for the persons for whom the facilities are primarily intended and
    - (b) that either
        - (i) those persons have need of the facilities by reason of their youth, age, infirmity or disability, poverty or social and economic circumstances, or
        - (ii) the facilities are to be available to members of the public at large or to male, or to female, members of the public at large

Lord Keith said in *Guild v IRC* "it suffices if the facilities are provided with the object of improving the conditions of life for members of the community generally''

IMPLIED OR IMPUTED TRUSTS – RESULTING TRUSTS

We are no longer talking about express trusts, but rather, implied trusts; these are not trusts that arise because it was the express intention of the testator to create a trust and are created through operation of law and are somewhat based on what the law presumes the intention of the settlor or testator to have been

- Implied trusts aren't declared and are expressed as existing through the court
- Resulting trusts are a branch of implied trusts along with constructive trusts

What is a resulting trusts?

Resulting trusts ''are imposed where one party transfers legal title to property to another, and receives nothing in exchange; in these circumstances a trust is imposed on the property for the transferor unless the transferee can prove that he intended to make a gift. The word ''resulting'' derives from the latin*resalire*, meaning to ''jump back'', and described the movement of beneficial ownership of the property back to the transferor from the transferee.'' According to Mitchell.

- Where one person has contributed to the purchase price of something but the title of the property has not been clearly allocated
- Where the court finds the trust (implies, constructs or results it) then it will not be subject to the same formalities as required by an express trust

When talking about property being held on resulting trust we talk about title being held but not the whole interest being vested in them

- Doctrine of resulting trusts operates to resolve those questions of ownership
- Classic example is the case of *Vandervell (No 2)* where trustees got royal college of surgeons to sign an option agreement to ensure he got his interest back
- Option to buy back shares was problem in the context of resulting trusts; indecision led HoL to declare the option to be an unspecified trusts and because equity abhors a vacuum the beneficial interest in the shares had to, by law, result back to MrVandervell as it couldn't remain unspecified

Professor Birks feels that resulting trust, in its literal origins, stems from the notion that the equitable interest in property ''jumps back'' to its original beneficial owner

A resulting trust arises where property has been transferred to the defendant and a recognised trigger for the trust occurs, which might arise at the time of transfer or subsequently so that the property is then held by the defendant on trust for the claimant

- ''Results'' back in equity to the person who transferred the property in the first place

When will a resulting trust arise?

Megarry J in the case of *Vandervell (no 2)* sets out 2 categories of resulting trust: the failed trust and the apparent gift:

1) Automatic resulting trusts: transfer of property leaves some or all of the beneficial interest undisposed of
    - Leaves some or all of the beneficial interest indisposed off
    - Arises automatically on the happening of a suitable set of circumstances
    - Where property has been transferred to the defendant to be held on an express trust that fails. Either initially or subsequently, that property will be held on resulting trust for the settlor or those entitled to a testator's residuary estate
    - For example, if one transfers their house to their sister for life and remainder to her children, and if the sister dies without children then the beneficial interest will result back to the person automatically
    - Operates on the notion that equity abhors a vacuum, and property rights must belong to some person and cannot exist in such a vacuum. Where there is no other equitable owner, those equitable rights are deemed to result automatically to the settlor
2) Presumed resulting trusts: property is transferred from A to B, in circumstances where it is appropriate to presume that B is a trustee
    - What equity is saying is when you transfer that property, equity will presume that you never intended to part out and out with the property and if the purpose for which it was given cannot hold it anymore then equity presumes it comes back to you
    - Claimant doesn't receive any consideration for this transaction then it will be presumed that the defendant holds the property on resulting trust for the claimant
    - Presumed resulting trusts constitute a means by which equity will supplement unclear factual circumstances by presuming that the equitable interest in property results to its previous owner
    - The beneficial owner has failed to dispose of everything in these circumstances and so the law presumes that where there is no evidence to suggest the settlor wanted to part out and out with the property then it will result back

        - Equity will presume one is holding the property on legal trust for themselves
        - For example, in a case where the evidence adduced by the witnesses will not conclusively support one or other of the parties such that the court cannot know which party to believe, the court will rely on one of its case law presumptions to imply an answer
    - But because it is a presumption, it is prone to rebuttal; if there is evidence that one intended to give the property outright to the other then the resulting trust presumption will be rebutted
    - Presumption of the resulting trust can be rebutted where there is evidence to suggest otherwise
    - In *Dyer v Dyer* A bought property but put it in the name of B
        - Established doctrine of court of equity that doctrine of resulting trust may be rebutted
        - Merely a presumption that may be rebutted

In *Westdeutsche v Islington LBC* Lord Browne-Wilkinson casts doubt on the rationale of Megarry J who said that ''both types of resulting trust are traditionally regarded as examples giving effect to the common intention of the parties. A resulting trust isn't imposed by law against the intentions of the trustee but gives effect to his presumed intention''

- Equity operates on the conscience of the person with the legal interest
- In this speech, Lord Browne-Wilkinson doubted the division set out by Megarry J between automatic and presumed resulting trusts to be correct in all circumstances
- Since the equitable jurisdictions to enforce trusts depends on conscience of person being affected, one cannot be a trustee of the property if they are ignorant of the facts alleging to affect his conscience
    - However vast amount of previous cases say otherwise
- Must be identifiable trust property
- He says once a trust is established, the beneficiary has in equity, a proprietary interest in the property from that date
- Under existing law a resulting trust arises in 2 circumstances:
    - Both are traditionally regarded as examples of trusts giving effect to the common intentions of the parties; needs to be intentions of both parties, those making and receiving must commonly intend for this trust to arise
- Resulting trust is not imposed by law against the intentions of the trustee but gives effect to its presumed intention

- Says Megarry J in ***Vandervell*** in regard to presumed resulting trust was wrong

- Also doesn't agree with automatic resulting approach in result to property; feels it is ownerless and will go to the crown bona vacantia
    - His Lordship feels that where the settlor has sought to divest himself absolutely of his right, there should not be a resulting trust in favour of the settlor
        - This is wrong arguably; English law has never expressly recognised the possibility of abandoning rights in property
        - Also, it is not justifiable as to why the rights should revert to the crown in preference to the original titleholder; is such an approach justified purely on the basis of convenience
    - Peyton feels this reasoning doesn't account for certain cases
    - Graham Virgo felt this was a confused approach

What is the role of intention?

Does a resulting trust arise automatically where there is a gap in the beneficial interest or is it based on the presumed intention of the settlor/contributor? Or is it based on the common intention of the parties?

Megarry in ***Vandervell*** felt the resulting trust was not based on intention, but rather on the law

- Identified two classification of resulting trusts: those which arise automatically and those arising from the presumed intention of the parties
- An intention can be inferred having regard to all the circumstances
- Didn't intend for it to come back to him but it nevertheless did through Megarry J's expression
    - ''The mere existence of some unexpressed intention in the breast of the owner of the property does nothing: there must at least be some expression of that intention before it can effect any result.''
    - This can be deduced from the evidence

Lord Browne-Wilkinson in ***Westdeutsche v Islington*** refers to the ''common intention of the parties'' and resulting trusts in his opinion were dependant on the intention of the transferor

- Resulting trust arises as a result of a common intention between the transferor and the transferee having to intend the trust to arise
- Lord B-W suggested, *Obiter*, that all resulting trusts should be considered to be presumed trusts

    - ''a resulting trust isnt imposed by law against the intentions of the trustee but gives effect to his presumed intention''

- Disagrees with Megarry J, but nevertheless if he is correct, it doesn't account for how the trust arose in ***Vandervell*** and other similar situations

- Is he confusing resulting trusts with constructive trusts though?

What is the solution to this question? Hayton suggests that the issue is whether the transferor intended to make a gift. If no gift was intended then the property results back; essentially feels Lord B-W was misled from the information presented to him

- Orthodox view is that the transferee's intention is irrelevant; not relevant that both parties intentions should be taken into account

- The question to ask is whether or not the person who transferred the property originally intended to give the property away outright; if there is such an intention and evidence, then the property is gone and is a gift, but in the absence of such an intention it results back

In ***Air Jamaica*** Lord Millett's reasoning was not so different from Hayton; intention not to give your property away as opposed to retaining it. Felt resulting trusts to be the response ''to the absence of any intention on the settlor's part to pass a beneficial interest to the recipient''

- ''A resulting trust gives effect to intention.'' But it arises whether or not the transferor intended to retain a beneficial interest

- May simply be sufficient to show that the transferor didn't intend the recipient to benefit from the receipt of the property

- Not looking to see if they intended to keep their beneficial interest; resulting trust arises out of an absence of an intention to part with it

- Goes on to say a resulting trust will not be defeated by evidence that the transferor intended to part with the beneficial interest if they did not in fact do so

- ''A man doesn't cease to own property simply by saying he does not want it. If he tries to give it away, the question must be if he succeeded''

- Question must always be if one has done everything to rid himself of the property

Failing trusts

When an express trust has failed for some reason

First situation in which a resulting trust will arise is the failure of an express trust where someone tries to create a trust but for one reason or another that trust fails and the interest they tried to get rid of will result back to them

- Automatic resulting trust will only arise where property has been transferred on an express trust that has failed
- Where a trust fails for any reason, the equitable interests purportedly allocated by the failed trust must pass to someone, once again following the idea that equity abhors a vacuum
- In consequence it can be seen that where the trust fails for any reason, the property intended to be held on trust will be held by the trustees on resulting trust instead

Uncertainty:

- *Vandervell* failed for lack of a beneficiary and so resulted back to the settlor

Lack of formalities:

- If you havent done all that is necessary to transfer the property to a person, then no trust will come into existence and the property results back to the person
- For example section 53(1)(b) LPA

Failure of a condition precedent:

- Idea that this trust will come into existence when they reach/conform to certain conditions, where it is not met or fulfilled then the interest will result back to the person who first settled the property
- In *Re Cochrane's ST* the lady got married and brought a trust fund with her to the marriage and her husband also did this with property. There were terms with this settlement
    - Entitled to the trust fund as long as she conformed to the terms
    - In the event of either of them dying, the survivor acquired all the beneficial interest in the property
    - Wife left husband and husband died and so question was if she was entitled to the entirety of the trust
    - Her part results back to her but her husband's part will be distributed in the way he envisaged

When a surplus of trust property remains

Second instance in where a resulting trust may arise is where there is a surplus of trust property

General rule is that such property will be held on resulting trust for the settlor, unless the court can find an intention to benefit specific individuals instead

Starting point is where you particularly give it for a purpose, and if that purpose ceases to exist, then equity will presume that you intended to get whatever is left back

In *Re Abbott* the fund to support deaf/dumb women was given by subscribers. High court held that trust property remaining undistributed at the time of death will go back to the subscribers

- Aim underlying the trust was not fully performed before the two ladies died. It was held that the trust property remaining undistributed at the time of death should be held on resulting trust for the subscribers
- If there was evidence that people were giving money away so that they could do whatever they liked with it, there would be no resulting trust. However in this case they gave money so as to support the sisters and so they retained their beneficial interest
- Money given for the purpose of support and maintenance so that when the purpose was concluded, the money resulted back to the subscribers

A similar line of reasoning was employed in *Re Gillingham* where money raised was overwhelmingly given anonymously; law will distinguish between small amounts of money donated in a pot (where they did intend to part out an out with your money) but where there were large sums of money given by identifiable donors then there would be a presumed intention that they didn't part out an out with their beneficial interest

- Problems arise with a resulting trust approach when there is a large number of mostly anonymous subscribers
- The victims of the crash didn't require all of the money raised and the issue arose as to the treatment of the surplus money raised from the public but not needed by the victims of the disaster.
- Court held that the surplus should be held on resulting trust for the subscribers
- Court is free to decide that when you gave your money you did intend to part out and out with it

In *Re Andrews* there was a trust fund for the education of Children of a deceased clergymen but wasn't given to a specific child but was a fund specifically for their education; when they finished there was still a surplus

- Judge held that the education/purpose wasn't confined to their formal education and treated the fund as being for the purpose of the boys generally
- Was an intention to give it to them outright and therefore did not result back to the subscribers
- Need to distinguish between a ''purpose'' and ''motive''
- Distinguished this from *Re Abbott* as the boys were not dead and could still benefit from the trust

Apparent gifts

When A has transferred property to B voluntarily

Third situation in which a resulting trust will arise is where there is a voluntary transfer of property from A to B, and A (who holds the property) voluntarily transfers it to another person

- By volunteer, it refers to someone who hasn't given consideration
- Therefore, a voluntary transfer is a transfer of property for which nothing has been given in return
- In what circumstances will that property result back
- Where there is evidence that one intended to give the property then there will be no resulting trust

There are a variety of presumptions, such as that of advancement whereby if A transfers property to B and B is the wife/female fiance/child of A, then up comes the presumption of advancement which rebuts the presumption of the resulting trust

- The situations in which a presumption is important are those cases in which neither party is able to prove to the court's satisfaction what their true intentions were
    - For these situations equity has developed presumptions as to what the parties intended, meaning that if neither party can prove conclusively what was intended, the court will go back to its presumption and deem that that is what happened
- Lord Upjohn, in ***Vandervell v IRC*** for example held that ''in reality the so-called presumption of a resulting trust is no more than a long-stop to provide an answer where the relevant facts and circumstances fail to reach a solution
- Advancement says that where such a transfer is enacted he did intend to give it away so as to advance the station of the female etc
- An old presumption which has technically been abolished under the equalities act but the section itself is still intact

First thing to do when looking at voluntary transfer is to look at the type of property as the rules are different if the property is real or personal

Land

Section 60(3) LPA 1925 which seems to be at odds with Lord B-W view of when a resulting trust will arise

- "In a voluntary conveyance a resulting trust for the grantor shall not be implied merely by reason that the property is not expressed to be conveyed for the use or benefit of the grantee."
- No presumption of resulting trust under this section 60(3)
    - Before s60(3), failure to specify a particular use of land, that the land was for the benefit of a particular person meant that the conveyance failed = resulting trust for transferor

- Effect of this provision might be to disapply a presumption of resulting trust where land is conveyed to the defendant (grantee) for no consideration simply because the conveyance didn't state that the property was conveyed for the defendant's use or benefit
    - S60(3) precludes Automatic Resulting Trusts, but not Presumed Resulting Trusts

In *Lohia v Lohia* both contributed to the purchase price of legal shares which is put in the name of the father and son, but 10 years later registry showed the land was transferred to the sole name of the father

- Father died in 1971 intestate
- Court held property goes to both sons
- On administration of the estate the property was vested jointly in the name of the first son and his brother whose two families lived together for a number of years but then fell out
- Strauss QC
    - Where there is evidence that A has given B property then it should be exactly what it looks like
    - Held that a voluntary conveyance means what it says
    - Resulting trust could still arise from voluntary conveyance where there was evidence that there was an intention to retain the beneficial interest and no intention to retain both legal and equitable title together
- Outreach of section 60 is limited
- Transfer was held to be a conveyance to the father meaning the brothers held the property 50/50

The case of *Ali v Khan* approved the above reasoning

- In this case the father had transferred property to his daughter in order to raise money to marry her off
- Clear evidence there was no intention to GIVE his daughter the house

Oakley sums up the position by saying that in regard to section 60(3) LPA ''there is no presumption of a resulting trust and it is for the transferor to prove that he didn't intend the transferee to take beneficially.''

Personalty

Deals with any transfer of property other than land where A is the absolute owner of the property and they transfer to B voluntarily and without consideration

Three principles that need to be considered:

a) If the claimant asserts that they intended the defendant to take the property beneficially, that is the end of the matter; no trust and the presumption of resulting trust will not be engaged

b) If the claimant doesn't assert that they intended the defendant to receive the property beneficially, there will be a presumed resulting trust in favour of the claimant, unless the relationship between the claimant and defendant is such that the presumption of advancement is engaged

c) Where presumption of an intention to declare a trust is engaged, defendant can try to rebut it by adducing evidence of relevant facts and circumstances to conclude that the claimant didn't intend the property to be held on trust for him or her, such as that it was intended to be an outright transfer by way of gift

In ***Re Vinogradoff*** a grandmother voluntarily transferred £800 of war blown stock in the name of her and her 4 year old granddaughter. By her will the grandmother left the stock to someone else and the question became when she made the transfer of stock to her granddaughter, was there a presumed resulting trust?

- Granddaughter has the legal title but there was no evidence that she intended to part out and out with it and so presumption arises that it was given on a resulting trust
- Farwell J held that the property should be presumed to be held on resulting trust for the grandmother
- This doesn't reconcile with the approach of Lord B-W in ***Westdeutche***
- The transfer of the security in a war loan by a grandmother into the joint names of the grandmother and her granddaughter gave rise to a resulting trust

When A has contributed to the purchase price of real or personal property in B's sole name or in the joint names of A and B

Fourth occasion is where there is a purchase by one person in the name/joint names of another

Where the claimant buys property in the name of the defendant, it is presumed that the property will be held on resulting trust for the claimant. Similarly, where the claimant has contributed to the purchase price of property that is in the name of the defendant, that property will be presumed to be held on resulting trust for the claimant in shares proportionate to his or her contribution

- This can be rebutted however either by establishing that the presumption of advancement applies by virtue of the relationship between the claimant and defendant, or by the defendant adducing evidence that the claimant intended the defendant to receive the property outright
- For example you buy a painting but put it in the name of your daughter or in the joint name of you and your daughter
- Where A has contributed to the purchase price of property in B's name or in the joint names; resulting trust will presume to arise in favour of the person who paid the purchase price of the property

- Idea in equity that it is tightfisted and will presume in the absence of contrary intention that you intended to retain the beneficial interest in the property

The case of *Dyer v Dyer* saw Eyre J state how ‘’the trust a legal estate, whether taken in names of the purchasers and others jointly, or in the names of others without the purchaser results to the man who advances the purchase money."

More recently the idea from *Dyer v Dyer* was confirmed in *Abrahams v the Trustee* where Mr and Mrs were members in a lottery syndicate and paid £1 each, but upon separation the Mrs continued to paid £2. eventually the syndicate won over £3 million with each member reciving almost £250k each, and the Mr became bankrupt and sought to claim his share, which was rejected by the Mrs as according to the principle that because she paid the entire money the winnings should result to her

- Held that she as a payer had the proprietary right that the money would result back to her
- No evidence to rebut that presumption

Rebutting the presumption of a resulting trust

Evidence that the intention of the parties was to make a gift or loan

Evidence you would need is that the transferor intended the transfer to take effect in some way other than a resulting trust

- Either intended to give the property away
- Or that they never intended to keep the beneficial interest
- In some circumstances the relationship between the parties can be used to suggest that a gift was more likely to be intended, such as in the case below

In *Fowkes v Pascoe* in the will the woman left the residue of her estate to John Pascoe’s mother (her daughter in law)

- Court of appeal held there was evidence that at the time she purchased the shares she did intend to make a gift to John; rebutted the presumption
- She could do what she wanted in her will with 50% of the shares but with the other as there was evidence that she wanted to give them to John, this fact rebutted the presumption that they would result back to them
    - The presumption was easily rebutted and the facts served to suggest that she had intended him to have a beneficial interest in the annuity
- James LJ set out the clearest general statement about rebuttals:
    - “Where the Court is asked , as an equitable assumption of presumption, to take away from a man that which by the common law of the land he is entitled to, he surely has a right to say ‘Listen to my story as to how I came to have it, and judge that story with reference to all the surrounding facts and circumstances”

In *Vajpeyi v Yusaf*,Yusaf was a young conservative Muslim boy aged 20 and he started a relationship with a 32 year old Hindu doctor with 2 children. Both people knew this relationship wasn't going anywhere and she lent £10k to Yusaf to buy property which he subsequently rented out. He collected the rent and they didn't live in the property. He then entered into an arranged marriage but the affair continued and a dispute arose regarding the money

- Court held there was no resulting trust and despite the presumption arising there was evidence available to rebut such a presumption
- Parties had never lived together and Yusaf had collected the rent for himself while she never showed an interest and both parties had subsequently started other relationships; this was evidence that rebutted any presumption that she intended to retain a beneficial interest

The presumption of advancement

Where a voluntary conveyance is made to a wife, fiancée or child of the transferor; or where the transferor is in *loco parentis* to the transferee, there is a presumption that the transferor has made a gift for the advancement of the transferee

When does the presumption arise?

- X is the father of Y
- X is in *loco parentis* to Y
- X is the husband of Y
- X is the fiancé of Y

Doesn't arise when:

- X is cohabiting with Y
- X is the wife of Y
- X is the mother of Y
- X and Y are the same sex

Such a presumption has recently been repealed under the Equalities Act which gets rid of the presumption of advancement, but as of yet it has not yet come into force

It will only arise where the male is in the certain position of relation, but not the other way round

- The use of presumptions in the modern age is possibly questionable due to this unbalance between the sexes. No logic to assume that the transfers between father and child should necessarily have a presumption of advancement attached to them where there is no such presumption in the case of transfers between mother and child
- It has been increasingly difficult to defend both in its general application and its discriminatory effect as between men and women

Parent to child

In *Sekhon* mother and daughter contributed to the purchase price of the house which was later purchased in the name of the daughter alone. Argued this was a joint venture by the mother, but the daughter argued this was a gift/interest free loan.

- Held there was no presumption of a resulting trust between mother and daughter and insufficient evidence to support this presumption
- No presumption of advancement between mother and child

In *Warren v Gurney* the presumption of advancement was rebutted by contemporaneous declarations of the father to the effect that a gift was not intended and by the fact that he had retained the title deeds to the property

In *Bennet v Bennet*MrsBennet sought return of money from estate of her recently deceased son

- Court held no moral obligation on a mother to provide for her child
- This presumption only applies to men who transfer property in certain relationships

Paradise Motors tells us that the presumption of advancement does arise between step father and step child

When dealing with presumptions and the level of evidence required to rebut it, the court takes a light touch in regard to this question as the principles are clearly outdated. In *McGrath v Wallace*court held that a house which was conveyed only in the sons name did give rise to a presumption of advancement, but this could be rebutted using comparatively light evidence in the contrary

- At the time of the transfer in the above case, a declaration of trust had been drafted indicating that the father was to have an 80% beneficial interest and the son 20%. This hadnt been signed and so it was not a valid declaration of trust, but it was sufficient to rebut the presumption of advancement
- This case demonstrated that the more modern approach is to accept a rebuttal of the presumption of advancement in family cases on the basis of comparatively slight evidence – even in a situation where an unexpected deed of trust was the only direct evidence indicating the fact that a father intended a division of the equitable interest rather than an outright transfer when conveying land into his son's name

Husband to wife

In *Tinker v Tinker* the husband was advised by his solicitors to have a house in his wife's name as this would prevent the creditor from seizing the property in the event he becomes bankrupt. Marriage broke down later however

- Argued there was a presumption of a resulting trust and his wife held the property on resulting trust for him
- Court found presumption of advancement applied in this case

- Held that he genuinely intended his wife to own the house and so the presumption of advancement was rebutted
- Essentially, you cannot have it both ways; policy rationale behind this reasoning
- Mr Tinker failed and it was held that the house put in the wife's name is regarded as belonging to the wife

In ***Pettitt v Pettitt*** a house was bought in the wife's name and this was seen as an opportunity to demonstrate the social relevance of advancement

- Lord Reid: wives' historical position in relation to their husbands meant it was sensible to give them the advantage of advancement
- Lord Diplock: advancement came from a pre-war era from cases deciding about the propertied classes. It would be wrong to apply advancement to post-war couples and in cases where the couples are not "propertied"
- Court essentially recognised the unfairness of such a presumption

The equality act 2010

(1) Section 199(1) states ''the presumption of advancement (by which, for example, a husband is presumed to be making a gift to his wife if he transfers property to her or purchases property in her name) is abolished.''

Illegality

What happens if the purpose of the transfer from A to B or the reason why the property to which A had contributed was in the name of B was to conceal A's ownership for fraudulent purposes?

The distinction between presumptions of resulting trust and advancement has proven to be especially significant where property has been transferred pursuant to an illegal transaction

- Most relevant form of illegality concern the transfer of property to the defendant in order to hide it from creditors or other people such as an ex-spouse
- However illegality can also involve tax evasion and benefit fraud
- This is why advancement hasn't been abolished because it can allow for fraudulent transactions

Equity wouldn't intervene to find an equitable interest on resulting trust in favour of a person who had transferred property away in furtherance of an illegal purpose. Such law was clear before the decision of the majority of the House of Lords in ***Tinsley v Milligan***

- Follows idea that ''he who comes to equity must come with clean hands''

    - When looking at the presumptions, it is important to consider the background to the cases, specifically looking for evidence of illegal purposes.

- When ''both parties are in the wrong, the possessor of the property is in the stronger position''

In the case of *Tinker v Tinker* one honestly intended to defeat his creditors. He couldn't have defeated them unless the beneficial ownership passed as well, presumption of advancement was strengthened

In *Tribe v Tribe* the father was in financial trouble when he made the transaction and feared he could lose his business; even though he had at the time of transfer an intention to defraud the creditors, such an illegality never came to pass and so he was allowed to rely on evidence that he didn't want his son to keep the money

- This case took into account the claimant's intention
- Held that the claimant was entitled to a resulting trust in his favour because his illegal purpose had not been carried into effect
- It was held that the claimant was entitled to plead an illegal purpose to rebut the presumption of advancement where he or she has withdrawn from the illegal transaction before any part of the illegal purpose has been fulfilled
- Millet LJ said It would be sufficient that the claimant has voluntarily withdrawn from the transaction before any part of the illegal purpose has been satisfied
- Held that property can be recovered as long as the illegal purpose has not been carried into effect

Leading case in the area is *Tinsley v Milligan* which concerned a same sex couple and is the best illustration for change in regard to advancement. Claimed that whilst Milligan did indeed contribute to the purchase price, the reason the house was transferred into Tinsley's name alone was due to a fraudulent purpose

- In the 3 courts, Milligan was successful
- There was strong evidence that her interest did result back to her
- Because there was a same sex relationship there was no presumption of advancement to rebut it and nothing to displace Milligan's equitable interest
- Despite the fact she had dirty hands, she didn't have to show them to the court and could keep them in her pocket
- Her right in equity arose at the moment the property was acquired and there was nothing to rebut such a presumption
- It was held by a majority that Milligan's counterclaim should succeed, because she didn't need to rely on her illegal conduct to assert her beneficial interest: to trigger the presumption of resulting trust, she simply needed to show that she had contributed to the purchase price

- This decision is clearly problematic and shows the disparity between the decisions where you transfer the property to those with whom you are in a relationship of advancement and when you transfer it to those who you are not
- Lord B-W set out the applicable principles:
    1. Real and personal property can pass under an illegal, and thus unenforceable, contract.
    2. Claimant can enforce his rights, as long as he does not need to rely on the contract for any purpose other than as the basis of his claim to a property right.
    3. It is irrelevant whether the illegality emerged in evidence or was pleaded, it is sufficient that the property was acquired under the illegal contract.
- Strong undertones of public policy in the fact that it is not possible to plead an illegal purpose

The case of *Lowson v Coombes* concerned an unmarried couple and confirmed the decision from the case of *Tinsley* in that there is no presumption of advancement between a mere couple, therefore he gets to keep his interest in the property

- Claimant in this case had transferred property into the name of his mistress to hide it from his wife if she should seek financial relief. This was clearly an illegal purpose. However the claimant was able to rely on the presumption of resulting trust because he didn't need to rely on his illegal purpose to do so.
- In the absence of a presumption of advancement, these normal practices can be maintained

In *Sansom v Gardner* a claimant who was relying on the presumption of a resulting trust was able to establish an equitable interest notwithstanding the presence of an underlying illegal purpose where he didn't have to rely upon that illegal transaction in order to establish that equitable interest.

A claimant can rely on a transaction to establish a beneficial interest in property even though it was tainted by an illegal purpose, but only as long as the claimant doesn't need to plead the illegality specifically.

A lot of discretion is afforded to the courts, especially under the proposals laid out by the Law commission which recommended statutory reform of the law to introduce statutory discretion as to the appropriate result where a trust has been created to conceal the beneficiary's interest in connection with a criminal purpose

- In such circumstances the court would have a discretion to determine that the claimant's beneficial interest in the property should not be enforced

A third type of resulting trust? *Quistclose* trusts

Where property has been given to a person or persons for a specified purpose which cannot be carried out of which, having been carried out, doesn't exhaust the funds available, should there be a resulting trust for the settlor or will the property be deemed to be an absolute gift?

A *Quistclose* trust is imposed over loan moneys if those moneys were lent subject to a condition that they were to be used only for a specified purpose but the borrower misapplied those loan moneys.

- If the loan moneys are used for some other purpose in breach of that condition, equity deems that a trust has been created over the loan moneys in favour of the lender.
- The lender's rights under that trust will defeat the rights of any third person to whom the borrower may have transferred those moneys in breach of that condition.

Recipient of that property must use it for that purpose and may hold it on trust for the transferor if the purpose fails

- This is of real commercial significance as where, for example, money has been lend, the recognition of the trust will mean that the debt owed by the borrower will be converted into a trust that will give the lender a proprietary interest in the money and so priority over the borrower's creditors if the borrower becomes insolvent

In the leading case of *Barclays Bank v Quistclose*, Quistclose lent £200,000 to another company and this was for a specific purpose and it was an agreed provision of the loan that it would receive the loan and only pay dividends to preferred shareholders and bank knew it was only to be used for the specific purpose.

- The loan was made solely for use for payment of the dividend
- It was held that the loan money, held separately in a share dividend bank account should be treated as having been held on resulting trust for the lender.
- House of lords unanimously held that the money in the share dividend account was held on trust for Quistclose on the basis that the specified purpose of the loan had not been performed
    - If there is a trust then barclays have essentially become the trustees as they have the legal title
    - Relationship between RR and Quistclose was contractual but money was essentially given on a primary trust, but if this fails then on a secondary trust for quistclose
- Lord Wilberforce's primary and secondary trust analysis:
    - Primary trust for RR to pay the dividends
    - Secondary trust for Q arises if RR do something else with the money
    - Either way, Barclays are not entitled to the money!
- Legal reasoning is still unclear and came to be considered again in the next case

In *Twinsectra v Yardley* there was a £1million loan made by Twinsectra to a Mr Yardley who was a property developer and the monies weren't given directly to him but to a Mr Simms

(who was just A solicitor) for the sole purpose of acquiring property. Made Simms promise that the funds would only be given where property is needed to be acquired

- In breach of his undertaking, Mr Simms paid the money to Mr Leach (Yardley's solicitor) who paid it out on the direction of Yardley for other purposes.
- First thing Lord Millet did was confirm reasoning from *Quistclose*
    - ''It is a resulting trust, but rather than the interest 'resulting back' to the originator, in fact, the lender retains an equitable interest throughout the transaction''
    - Said such a trust doesn't arise merely because money is paid for a particular purpose
    - Once lent the money is at the free disposal of the borrwer
    - Question is whether parties intended the money to be at the free disposal of the borrower
    - All judges held that the money was held on trust for Twinsectra, but Millet in particular felt it was held on a Quistclose trust
- Must ask if the person who received the money can act selfishly/selflessly
- Millet then looked at relationship between borrower and lender
    - Unconscionable for a man to obtain money based on his application and then completely disregard it
    - A person places his trust and confidence in such a person to ensure the property is dealt with in a certain way
    - What is required is that the money is not intended to be at the free disposal of the borrower
- Old fashioned ideas of conscionability; if it is affected then they become a trustee and one cannot do what they want with the money
- Concluded that money remains the property of the lender unless and until it is applied in accordance with the lenders intentions
- Millet reasons this is the only analysis that sits comfortably with trust orthodoxy and commercial relality
    - Since the money had been lent for the exclusive purpose of buying property and had been applied for a different purpose, it followed that the money was held by sims on resulting trust for Twinsectra, but subject to a power for the money to be used by Yardley in accordance with the undertaking
    - Doesn't agree that there has to be a positive intention to retain, but rather an absence of an intention to give it away

There are nevertheless problems in this area of law

In the case of ***Re Farepak*** which concerned a savings scheme which went into liquidation, the question was whether the money paid by customers was protected by a ***Quistclose*** trust?

- Money was paid to Farepak in a variety of ways but ceased trading on the 10th October 2006 and 2 days later a trust was declared over the bank account
- Customers are going to argue that they gave their money for a particular purpose
- This money didn't give rise to a fiduciary obligation
- Nothing in the contract between Farepak and its customers that stated it was being held for a purpose; lack of fiduciary meant no Quistclose
- Court held that this was a simple contractual arrangement - no fiduciary relationship - customers were unable to claim their money ahead of any other creditor

RESULTING TRUSTS, CONSTRUCTIVE TRUSTS AND THE FAMILY HOME

Express trusts of land must be evidenced in writing in accordance with section 53(1)(b) LPA 1925

Dispositions of equitable interests must be in writing according to section 53(1)(c) LPA 1925

Section 53(2) states how formalities requirements do not apply to resulting or constructive trusts

What is a constructive trust?

A distinctive feature of a constructive trust is that it arises by operation of law, without regard to the intentions of the parties, as was shown in *Air Jamaica v Charlton*

Gary watt thinks it is the complete polar opposite of an express trust as it may be imposed directly contrary to the owner's intentions

- It is the epitome of equitable interests and arises where the facts are such that it would be unconscionable that another may have gained an interest in the property
- Both positive (vindicate the equitable entitlement of the beneficial owner) and negative (so as to restrain the unconscionable behaviour of person who has legal title)

In *Paragon Finance* Millet LJ says it arises by construction of the law whenever the circumstances are such that it would be unconscionable to deny the beneficial interest of another

In the case of *Carl Zeiss*, Edmond Davies LJ sets out a different approach in regard to when constructive trusts arise; there are flexibilities and indeed no boundaries

- "English law provides no clear and all-embracing definition of a constructive trust. Its boundaries have been left deliberately vague so as not to restrict the court by technicalities in deciding what the justice of a particular case might demand"

This area does indeed surround itself in controversy. Some judges led by Lord Denning used the constructive trust as a mechanism with which to create equitable property rights where justice and good conscience demanded it.

- Recently, Lord Browne-Wilkinson recognised that unconscionability on the part of the defendant was the general principle that underpins the recognition of the constructive trust in all cases

- Lord Scott had recognised that it is not possible to prescribe exhaustively the circumstances under which a constructive trust will be created.

Is it a proprietary constructive trust or a personal constructive trust?

A proprietary constructive trust:

- Beneficial right in specifically identifiable property – enforceable against third parties
- A right in wren (in the property held by person found to be constructive trustee)
- This is enforceable against any other party except for equity's darling
- May not matter if the person is absolvent, as long as the property exists
- Strong interest as it is a right to the thing

A personal claim:

- An *in personam* right against the constructive trustee to make the constructive trustee personally liable for loss

Is it institutional or remedial?

The difference is important as it can determine if your right is proprietary or personal

Institutional:

- Essentially says the right is proprietary
- This is the orthodox mode of analysing these trusts
- Court simply recognises that the trust has already arisen, without having any discretion as to whether or not to do so
- Right is in the property and your right to the property arose at the time of the unconscionable behaviour; doesn't matter if it may be a few decades before the claim comes to court; arose at the moment of unconscionable behaviour and is there all the time and doesn't rely on the court saying that due to someone doing you wrong they deserve to be punished
- In the case of *Re Sharpe* it was said how ''it exists from the time that the relevant facts occurred''

Remedial:

- Court will look at what happened between the parties and will give a remedy as an end result
- Can be awarded where a judge, in the exercise of his or her discretion, considers that it is appropriate that the defendant should hold property on trust for the claimant
- Court decides at the end of the claim or the dispute what one is to get and this is different from institutional

- In the case of *Metall und Rohstoff* it was said that ''the court imposes a constructive trust on assets which aren't subject to any pre-existing trust as a means of granting equitable relied in a case where it considers it just that restitution should be made''
    - Essentially, the trust doesn't arise unless and until the court says it does

Constructive trusts in English law are said to be institutional:

- Arises by operation of law
- Court acknowledges its prior existence and that the right was always there when the unconscionability takes place
- In *Re Sharpe* at the time someone acquires your property and acts unconscionably with it, that is the moment you become a constructive beneficiary
    - Right was there all the time; institutional
- Lord Browne-Wilkinson said in *WestdeutscheLandesbank* that an institutional trust arises by operation of law as from the date of the circumstance which gave rise to it. A remedial constructive trust is a judicial remedy giving rise to an enforceable obligation: the extent to which it operates retrospectively to the prejudice of third parties lies in the discretion to the court

Remedial trusts are primarily used in America:

- For court to declare at the hearing that from now on the subject matter in question is held on constructive trust
- Normally found where one has benefit from the claimant's property or has been unjustly enriched at the expense of the beneficiary
- Beneficiary under a remedial constructive trust may not necessarily gain priority over rights of third parties, whereas if it is institutional the rights are regarded as always being there
- Don't exist unless and until the court says they do

A new model constructive trust?

Remedial constructive trust is also used in other jurisdictions. Denning attempted to bring about a new model constructive trust.

In 1970s, Denning devised his own remedial constructive trust (''new model'') as means of resolving disputes in the family home. In *Hussey v Palmer* a new model is held to be imposed by law whenever justice and good conscience require it and it is a liberal process founded on large principles of equity

- ''It is a liberal process founded on large principles of equity where the legal owner cannot conscientiously keep the property for himself alone. The trust may arise at the outset when the property is acquired, or later on as the circumstances may require. It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution."

- Talks about it being based as a liberal process and large principles on equity; doesn't want any restrictions, but does describe it as a remedy by which the court can enable a bereaved party to gain restitution

Whilst strict position remains that English law doesn't recognise remedial constructive trust, there has been *Obiter* in support of such constructive trusts in some other cases

- Have been attempts to make it a remedy as opposed to an institutional right
- In *Westdeustche* Lord Browne-Wilkinson said ''the court by way of remedy might impose a constructive trust on a defendant who retains hold of property whom the claimant has been unjustly denied.''
- But in *Halifax v Thomas* the BS sold property and paid remaining amount due, and requested that they be allowed to retain this money under a remedial constructive trust. Claiming this would be unconscionable as he gained it through fraud and this would lead to unjust enrichment and therefore this would be a good place to have a remedial constructive trust so that he doesn't keep to keep the benefit of his fraud
    - Gibson LJ stated that ''English law has not followed other jurisdictions where the constructive trust has become a remedy for unjust enrichment''
    - Quite plainly our law isn't at the point of having a new model

Most commentators will agree on some circumstances under which a constructive trust will arise; General idea that constructive trust will arise where it would be unconscionable to allow a person to rely on their legal rights

Equity and the family home

How does equity deal with the acquisition of beneficial rights in real property, the family home, where the person wishing to assert a beneficial interest doesn't have a corresponding legal right?

Equitable ownership in a home can actually arise in a number of different ways

1. Express declaration of trust
2. Resulting trust
3. Proprietary estoppel
    - Is a remedy but isn't institutional; court looks at facts of the situation to assess who is deserving of a remedy
4. Common intention constructive trust
    - Most common way of settling property

In the case of a married couple, the older rules of property law wouldn't recognise a wife's contribution:

- In *Rooney v Cardova* it was said that the common law stated a wife couldn't hold property and any would become the property of her husband

- More modern view is that a marriage is a partnership of equals; however keeping a house and looking after the kids isn't recognised as an economic contribution

Law makes a distinction when it comes to deciding who owns the family home; where couple are married, the Matromonial Clauses Act comes into play and allows the court to reallocate the property on divorce

- If the couple is married and one party owns everything, the court has power to take it away from that person and give it out
- Even if the property is solely in one parties name, if the parties are married the court has power to change that under the statute
- But where the parties aren't married, then the courts have no such statutory powers and resort to the laws of property and in this case the law of equity and trust
- Another problem arises for couples who aren't married, but cohabit

Where parties haven't expressed their intention, the court seems to be settled on the principles they will employ to determine beneficial interests

<u>1)Express declaration</u>

Where the property has been registered at law in the name of one or both of the parties, the beneficial interests in that property may have been determined by an express declaration of trust

As the subject matter of the trust being considered is land, such a trust will need to be evidenced in signed writing to be enforceable

- Where the relationship between the parties is domestic, it is much less likely that they will even have considered what their respective beneficial interests in the property might be, let alone prepared any written document to identify these interests
- Many of the problems encountered in this area of law could be avoided if the parties were to consider their beneficial interests when acquiring the property and prepare a document confirming what these interests are

Where parties have bought the title, you can declare to hold beneficial interest jointly

- In <u>*Goodman v Gallant*</u> a verbal agreement was reached that husband and wife would share the interest equally. Later she claims to be entitled to 75%, but Slade LJ rejected her claim. Mr Gallant was entitled to 50% of the property
    - "Where a conveyance into joint names contained an express declaration of trust that the parties were to hold the proceeds of sale of the property on trust for themselves as joint tenants, then on severance of the tenancy, a tenancy in common, in equal shares was created…"
    - "…the doctrine of resulting, implied or constructive trust could not be invoked where there was an express declaration"
    - As said by Slade LJ

However, just because the parties take the property into joint legal title doesn't automatically equate them with absolute ownership:

- *Goodman v Carlton* it was agreed that Mr Goodman would buy the house with Ms Carlton as co-mortgagors; wasn't clear what interest each person would have and no agreement was made in regard to their respective interest
    - There is clearly an intention on his part that he was buying it for himself but he just couldn't finance it
    - All she thought she was doing was helping him with the money and he intended to pay her back and get the mortgage back after a year
    - Legal title was transferred into joint names
    - Goodman alone dealt with solicitors and paid the mortgage and Carlton never actually lived in the house
    - He died before he could transfer title into his own name
    - Carlton acquires legal title and surviving party
    - Goodman's son claimed Carlton held property on trust for his father's estate absolutely
    - At first instance and CoA the son prevailed and Mummery LJ held the house was held on trust for Goodman's estate as there was no common intention between parties to share beneficial interest
        - She claimed her interest was expressed in terms of the liabilities as co-mortgagor and this must count for something
        - Her argument was rejected and the court said this wasn't equivalent to a contribution price and wasnt capable of giving rise to any resulting trust for her
        - Court held there was no common intention (in regard to constructive trusts) that the house would be held for their joint interest; she didnt intend to have any interest and neither did he and at the end he took action to make it all his
        - In the absence of contribution to purchase price, no resulting trust either
    - Property did result back to Goodman's estate
- Obiter in *Stack v Dowden* suggested two things:
    1. Even where parties have declared intention as to what shares the beneficial interest is to be held, this won't be upheld if there is evidence to show this isn't what the parties intended
        - Says that even though youve declared shares you will hold the house in, the court may alter this

2. Where legal title is in joint names, the starting point is that equity follows the law; if legal title is 50/50 so will equitable title. But the party wishing to assert that it should be other than 50/50 may bring evidence to rebut this presumption. Will be for the person who may have contributed more (75% for eg) to show there was a common intention between parties that shares must be other than 50/50

- Before *Stack v Dowden* if you contributed a certain amount, the resulting trust analysis would mean you get exactly what you contributed. This area of law has now been altered.
    - Most people dont take the time to express how their legal and equitable interests would be held
    - Problems arise most commonly where the house is held in the name of one party only

2)Presumed intention resulting trusts

This may operate to allocate beneficial interest in a shared home context

- Where one party has contributed to the purchase price of property that is registered in the name of another, it will be presumed in such circumstances that the contributor of the purchase price intended the property to be held by the other party on trust for him or her

Resulting trust will arise to confer a beneficial interest on a person who has contributed something to the purchase price but isn't named as the legal or equitable owner. Equity will presume that the person who advanced the money to purchase the property wished to have a beneficial interest in it

- Doesn't matter that your name isn't on legal title; if you've contributed the resulting trust operates to give you back your share in proportion to whatever you've contributed
- This is just a presumption and must be remembered that if there is evidence that the money should be an out and out gift, the presumption can be displaced

In *Pettitt v Pettitt* it was said by Lord Reid that in absence of intention to the contrary, a person will acquire a beneficial interest in the property in such circumstances

Said in *Gissing v Gissing* that there would be a resulting trust in favour of the wife if she contributed to the purchase price

Presumed intention resulting trust can even arise where both parties contribute to the purchase price and are joint legal owners but there is no declaration as to how the beneficial equitable interest should be shared. In such a situation there are a few possibilities:

- If it is proportionate to your contribution, the interest is mathematically based and split according to your level of contribution in law and equity
- In *Springette v Defoe* the legal title was conveyed into joint names and there was no declaration as to how the beneficial interest was to be shared. Was a

presumption that property was held on resulting trust for the owners in proportion to what they contributed

However the above principle has been cast into doubt since *Stack v Dowden*

- Held there should be a presumption where property is acquired in joint names, that from now on there will be no presumption that they hold the shares according to their contribution, but rather hold it in equity 50/50
- This knocks the resulting trust right out of the ring and casts a lot of doubt on the shared home scenario

Also, in *Gibson* Arden LJ said the function of the advancement is now performed by the presumption of joint legal title equals joint equitable title and this displaces any presumption of advancement

- ''The function of the presumption of advancement is now performed by the presumption of equal beneficial ownership of property held in joint names laid down in*Stack v Dowden*''

3)Proprietary estoppel

David Hayton said that ''for there to be a successful equitable proprietary estoppel claim by F there needs to be unilateral conduct by M, leading F to believe that she has an interest in the family home so that she acts to her detriment so that it becomes unconscionable for M to insist on his formal 100% ownership of the home.''

Essence of this doctrine is that where the defendant has made a promise or assurance that the claimant will acquire an interest in specified property and the claimant has relied on this promise or assurance to his or her detriment, the claimant has a mere equity entitling him or her to equitable relief, which might involve the claimant acquiring an interest in the property

- A remedy awarded at the discretion of the court which may or may not give rise to an equitable proprietary right in property

Prior to *Stack v Dowden* the general view was that proprietary estoppel and the common intention constructive trust were very similar if not identical. However since the decision, the common intention constructive trust no longer depends on detrimental reliance and so, as Lord Walker recognised, proprietary estoppel and the common intention constructive trust have not been assimilated.

This won't always give you a proprietary right but perhaps a legal right to remain in property, or a charge in property or even a cash equivalent

- Not institutional and not necessarily proprietary
- Where proprietary estoppel is established, the court, in the exercise of its discretion, may decide that the defendant holds property on trust for the claimant
- Essence of this doctrine is that, where the claimant has relied to his or her detriment on an assurance that he or she will acquire an interest in property belonging to the defendant, the court may recognise that the claimant has a beneficial interest in that property.

- Once requirements for estoppel have been satisfied, the court has a discretion to award the claimant the appropriate relief in the light of all relevant circumstances

''The minimum equity to do justice''

David Hayton states the difference between estoppel and a constructive trust:

- ''Trust requires a bilateral agreement that if female acts in a particular way, she will then obtain the agreed share in the family home. if she so acts, she must receive her fair share leaving the court no discretion''
- Court won't automatically perfect the gift to the female
- Court intervenes only to the extent to determine ''minimum equity to do justice''
- Unconscionability isn't a talisman for the idiosyncratic promises and expectations
- Estoppel will only give you the minimum equity to do justice; up to judge to decide what needs to be done for justice

Wilmott v Barber showed how it essentially boils down to if the defendant made a representation he intended the claimant to rely on and he knew full well they would rely on it and they did in fact rely on it. If it was detrimental the court may do the minimum for justice

In *Pascoe v Turner* we see the courts say the minimum equity to do justice did require the transfer of the fee simple to the woman. Person did acquire a proprietary interest in the property through relying on estoppel; nevertheless still rare

In *Matharu v Matharu* the father allowed son and his wife to live in the property and she took out money from her parents to pay for a new kitchen on the mistaken belief that it was the son;s property. Sought a declaration that she had at least some interest in the property

- Estoppel in itself didnt require that she was given a proprietary right in the property; minimum to do justice was to merely give her a license for her life or a shorter period she may decide.

In *Thorner v Major* the HoL had to consider what constituted the making of a representation

- Didnt matter in this case if conduct was express; could be implied through conduct and behaviour
    - Can be made by silence or inaction
    - Must be sufficiently clear and unequivocal
    - Where the representation related to the acquisition of a proprietary interest in the future, it can be reasonably understoof by the claimant to constitute a commitment or assurance by the defendant as to the defendant's future conduct
- In this case the claimant had worked on a relative's farm for 29 years without payment with the expectation that he would inherit the farm on the farmer's

death; it was held to be sufficient that the claimant reasonably understood that he had received assurances from the farmer that he intended the claimant to inherit the farm

- Although the farmer hadnt made any express representation that the claimant would inherit the farm, this could be inferred from indirect statements and his conduct over the years

In *Sledmore v Dalby* we are told that minimum equity to do something could in fact be to do nothing:

- Very rare that people will acquire a beneficial interest as a result of minimum equity
- As the court has a discretion to award the claimant the appropriate relief in the light of all relevant circumstances, this could mean the court decides the claimant to not obtain any relief, or that the benefits he or she had already received are sufficient to satisfy the estoppel

Unconscionability

In the case of *Taylor Fashions Ltd* it was said in regard to unconscionability that ''would it be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment''

In *Gillet v Holt* ''the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine''

However it was said in *Cobbe v Yeoman's Row* that ''a claim in estoppel based solely on 'unconscionable behaviour' and no more would be a recipe for confusion''

4)Constructive trusts and the family home

Baroness Hale set out the reasons why a constructive trust is used in this area in the case of *Stack v Dowden*

- Huge expansion in home ownership
- Rises in value of real property
- Recognition by the courts of the differences between people acquiring property together in intimate and commercial relationships
- Matrimonial Causes Act 1973
- Cohabitation without marriage on the increase
- Myth of 'common law marriage'
- No legislation in this area

What we see her introducing here is the family law tactics in that it is different between husband and wife; no need for these considerations here arguably

- The constructive trust has become very prominent for all the above reasons

The common intention constructive trust:

Especially significant in determining the beneficial interests in a house bought by a cohabiting couple as the family home upon their relationship breaking down

- This is a distinct form of constructive trust that is triggered with reference to the express, inferred or imputed intention of the parties, and which is known as the common intention constructive trust
- Arises from an agreement or understanding of the parties
- This is significant where a couple have cohabited and their home is registered either in the name of them both or in the name of one of them only

This has proven to be most significant in determining the beneficial interests in a house bought by a cohabiting couple as the family home. Once their relationship has broken down, it will be necessary to consider the extent of their respective interests in the property

In the case of *Pettitt v Pettitt* it was said by Lord Denning that ''where the acquisition or improvement of property is made as a result of contributions in money or moneys worth by both spouses acting in concert, the proprietary interests in the family asset resulting from their respective contributions depend upon their common intention as to what these interest should be"

- Court wanted to know what the parties think at the time
- Have to look back at the time the property was acquired
- It may be possible to infer from their conduct that they did in fact form a common intention as to their respective proprietary interest, otherwise the courts impute to the parties a common intention which they never formed
- Idea of the courts saying that if they haven't actually expressed what their intentions were and they could infer it is worrying and even more worrying is the notion of imputing intention
- Imputation does get lost over the years and the courts move towards an inferral as opposed to imputing

In cases where the conveyance of legal title remains silent as to how the equitable title is to be held, if the property is conveyed to one spouse at law it will operate also to convey the beneficial interest.

Lord Diplock in the case of *Gissing v Gissing* said a wife can still have a beneficial interest if a resulting or constructive trust arises and this will be where equity makes trust of a beneficial interest where it would be unconscionable for the person who has the legal equitable to retain and deny the other the beneficial interest

- It will be inequitable if
    - Where there was a common intention that both should have a beneficial interest

- The non-legal owner has acted to their detriment on the basis of that common intention
- That common intention may be express or inferred by the court based on the parties conduct

- Court has said that the common intention constructive trust will arise to give the wife a beneficial interest if certain criteria can be demonstrated
- Lord Pearson is recognising that indirect contributions could well be taken into account and used by the court to infer a common intention to share the beneficial interest

Types of common intention constructive trusts:

1) **EXPRESS COMMON INTENTION CONSTRUCTIVE TRUST**

The door Lord Pearson tried to push open was shut in *Lloyds v Rosset*where the husband bought a derelict farm house with his own money and the title was conveyed into his sole name. The most significant reformulation of the common intention constructive trust was undertaken by Lord Bridge in this case. He recognises that where property has been registered in the name of one of the parties, the common intention constructive trust could arise in 2 different ways.

a) Has there been at any time prior to, or exceptionally after, the acquisition of the property, an agreement, arrangement or understanding that the property is to be shared beneficially?
    - Where the parties had expressed a common intention to share the beneficial interest, followed by detrimental reliance by the claimant that is referable to that common intention
    - If you can show there was an express agreement, then if the person can show they relied on it, then gives rise to constructive trust and/or estoppel
b) Is there any reason – based entirely on the parties' conduct – to infer a common intention the share the property beneficially?
    - Where a common intention to share the beneficial interest can be inferred because the claimant has made a financial contribution to the purchase price of the property or to the payment of mortgage instalments
    - If there isnt any evidence of express agreement, the court must entirely rely on the conduct of the parties

What is meant by agreement, arrangement or understanding?

In the case of *Springette v Defoe* it was said that in the absence of any express agreement, arrangement or understanding, the principles of resulting trust will apply

- Seems to support the idea that such an understanding or arrangement must be expressed in order to constitute a common intention constructive trust but in the absence of this a resulting trust will arise

In *Clough v Killey* it was even said that these factors may be formed after the acquisition of the property

- The agreement, arrangement or understanding doesn't have to made contemporaneously with the purchase

Is there an objective test of intention?

- Arises somewhat on behaviour of parties and court feels there is a mutual common intention between parties that beneficial interest should be shared so that it would be unconscionable to deny such interest being shared; court was prepared in certain circumstances to find this intention even through indirect contributions to the household over the period of cohabitation as said in *Gissing*, but then in *Lloyds* it was narrowed down to 2 circumstances where common intention could be found
- In *Eves v Eves* the unmarried cohabiting couple resided in a house under the name of the man who told his partner her name wasn't on the title because she wasn't yet 21. Lord Denning found the man to be a constructive trustee of the property and he held it on trust for himself and the woman, not on equal shares however. This doesn't sit well with trust orthodoxy.
    - Been argued there was no common intention, despite lying to her, his intention was never to share the beneficial interest
    - Denning's statement seems to suggest the test as to whether parties have common intention is an objective as opposed to subjective test. Doesn't matter what he was actually thinking, he would have no reason to lie to her if she thought she was entitled to a share
- Denning's reasoning was followed in *Grant v Edwards* where two men moved into property belonging to Grant who told a woman the only reason her name wasn't on the title was because she was still going through divorce proceedings. When she later tried to claim an interest in the property, it was said there was a common intention for the plaintiff to have an interest in the house
    - If only reason she wasnt named was because of the excuse given to her, then there was in fact a common intention
- In these cases where one party has lied to another about the reasons why their name isnt on the title shows a turnaround; where one party believed themselves to have their name on the title the court would see no reason as to why one party would need to lie to another.
- Gary Watt: ''only express intention was the defendant's intention not to give the claimant an interest in the property, and this could only be inferred through getting a meaning contrary to the envisaged one.''
- Courts are prepared to say that even if you have this private intention, you would only ever have to make an excuse if there was an initial understanding that their name should be on there.
- In *James v Thomas* this excuse leading to common intention wasnt followed. Thomas owned a property when James moved in, and she worked all 15 years

without any pay and all profits put into a bank account in his name and all outgoings were paid from this account

- Held her interest must be determined by principle of equity and law, which however inadequate must now be taken as well established and unless she can bring her claim within these principles, it will fail
- Court wasnt prepared to find that by his evasiveness he thought there was a common intention

So, what must the parties have agreed?

- Lord Bridge said in the case of ***Rosset*** that ''neither a common intention by spouses that a house is to be renovated as a ''joint venture'' nor a common intention that the house is to be shared by parents and children as the family home throws any light on their intentions with respect to the beneficial ownership of the property''
- The intention must be nothing less than intending to share the agreement as stated in ***Rosset***.
    - To have a common intention, it must be nothing short of a common intention to share the beneficial interest

Detrimental reliance

Once established there is an express common intention to share the beneficial interest of the property, the partner asserting the claim against the partner entitled to the legal estate, Lord Bridge also said the person trying to assert the beneficial interest must show they relied on their detriment on reliance of this agreement.

The case of ***Midland Bank v Dobson*** conveyed how common intention on its own wasn't enough, and ***Gissing v Gissing*** said the same in regard to detrimental reliance on its own also not being enough

- Must have express common intention coupled with detrimental reliance and this can be quite difficult

In order for something to amount to detrimental reliance, it has to be something outside of the gender stereotype

What is deemed to be detrimental to the claimant?

- In ***Grant v Edwards***, Nourse LJ said that ''what was required was conduct that she couldn't reasonable be expected to embark upon unless she was to have an interest in the house''
- Courts again talk about detrimental reliance in ***Hammond v Mitchell*** concerning a car dealer and a 21 year old playboy bunny. Act of her agreeing to subordinate any rights in the house to the bank was an act of detrimental reliance.

2) INFERRED COMMON INTENTION CONSTRUCTIVE TRUST

Circumstances under which court is prepared to infer are very limited; court must rely entirely on the conduct of the parties both as basis to infer common intention to share property beneficially and the conduct intended to give rise to a constructive trust. In the case of ***Rosset***, Lord Bridge identified two questions that needed to be asked:

a) Was there a contribution to the purchase price?

b) Was there a contribution to the mortgage payments?

    - Doubted that anything less than contributing to purchase price or mortgage payments would suffice

    - Would be assumed that the contributor wouldnt have made the contribution unless they were expecting to obtain some ownership of the property

Court simply tries to establish from all of the available evidence that there was a genuine agreement or understanding between the parties as to the allocation of the beneficial interest. As said in ***Jones v Kernott***, an inferred intent is an actual intent, albeit one that can be deduced objectively from the parties' conduct.

Despite the fact Baroness Hale, in the case of ***Stack v Dowden*** criticised ***Rosset*** by saying it ''may have set the hurdle too high in certain respects'', and Lord Walker also expressing how he thought the time had come to take a wide view of what is capable of counting as a contribution towards the acquisition of a home, the case of ***Morris v Morris*** made it clear that the ***Rosset*** rules remained in place.

Resulting or constructive trust?

In ***Midland Bank v Cooke*** the man put in his savings, took out a mortgage and the remainder of the purchase price of the property was made up of a gift his parents gave to the couple. Question was if woman had contributed to the purchase price; she clearly did in the form of half the gift.

- Mrs Cook had signed a form forgoing any rights in the property against the bank, but this was before the house was transferred in the joint names of Mr and Mrs Cook

- She argued that her signature signing away was obtained under undue influence and secondly she was entitled to half of the house.

- Court reasoned that as she had established an interest in the house based on her contributions, the court was entitled to look at all the circumstances to give effect to this common intention; court was free to allocate (if an intention could be found) interests to the parties different from the original shares

    - Direct contribution = AN interest in the property = court entitled to look at the full course of dealings between the parties to give effect to their true COMMON INTENTIONS

    - Such scrutiny not limited to acts of direct contribution

    - The court is not bound to deal with the matter on the strict basis of the trust arising from the cash contribution to the purchase price, and is free to

attribute to the parties an intention to share the beneficial interest in some different proportions

- If you can establish an inferred constructive trust, must be able to show some detrimental reliance
    - Pearson Stevens say where the constructive trust is inferred, the fact you have contributed to the purchase price is almost always sufficient to show detrimental reliance
- Common intention was found, and then proportion of shares were deduced

In the case of ***Drake v Whipp*** Gibson LJ stated that ''in the case of a family home, a beneficial interest is often asserted on behalf of a spouse or partner who has contributed towards the purchase of the home. In such a case, the nature and extent of the interest in the property will depend on whether the parties had a common intention to share the interest in the home, either expressly or in some cases by implication, in which case, provided there is detrimental reliance, a constructive trust will be imposed. Where there is no finding of such a common intention, but there has been a contribution to the purchase price, beneficial ownership will arise by means of a resulting trust.''

Determining the shares of the parties (quantification)

Once youve established intention, you need to quantify the interest

In ***Le Foe*** upon the judge deciding that the claimant was entitled to A share, the issue now was what share and how much she would get. Referred to ***Midland Bank*** case, he adopted more holistic global approach and ordered her 50% of the value

In ***Oxley v Hiscock*** Chadwick conflates resulting trusts, constructive trusts and estoppel. Couple weren't married but lived together for about 20 years, and had both contributed various sums of money to the purchase price of various properties and both had been instrumental in the paying off of mortgages. She argued she was entitled to a half share as the intention had always been that the property would be jointly owned.

- Having regard to the whole course of dealing between parties people would be given a share proportionate to their input
- Once youre in over the threshold, the course looks at the course of dealings between the parties from which they will infer the share to which people would have a common intention
- Court is using orthodox trust tools to decide what the parties get, but Chadwick in this case feels he can do what is fair based on the course of dealings between the parties
- He also went on to say there is no difference in outcome whether the true analysis lies in a resulting trust or proprietary estoppel
    - "The time has come to accept that there is no difference in outcome, in cases of this nature, whether the true analysis lies in constructive trust or proprietary estoppel"

- This is simply untrue. A constructive trust is an institutional right in property whilst estoppel is remedial

Thompson says in the present case although the basis of the quantum was on the courts perception of fairness, it corresponded exactly with her financial contribution to the estate. Court of appeal in fact actually just worked out the interest on a resulting trust analysis

- End up awarding her an amount proportionate to her contribution which is what she would be entitled to under a resulting trust analysis
- Also notes the two things arent the same as the constructive trust can only properly operate in the context of acquiring property while estoppel can also operate in regard to easements for example. In the case of a constructive trust, the effect of the imposition is to enforce the agreement already made by the parties but with estoppel the court will simply give a remedy which is appropriate
- Concludes that the judgment from ***Oxley*** unfortunately lost the opportunity to restate the law in a more principles manner; role of constructive trust seems to have been eliminated and replaced by a trust on the principle of fairness

3) CONVEYANCE OF LEGAL TITLE INTO JOINT NAMES – NO DECLARATION AS TO THE BENEFICIAL INTEREST

Different from ***Rosset*** as in this case it deals with a scenario where the legal title to the property has been transferred jointly, but there is no declaration as to how the beneficial interest is to be held

The historical position in such cases is that in the absence of any express declaration as to the beneficial shares, a property in joint legal names would be held beneficially in shares proportionate to the parties contributions to the purchase price

- Baroness Hale said in ***Stack v Dowden*** that ‘’the starting point where there is joint legal ownership is joint beneficial ownership’’
- Equity follows the law

The case of ***Stack v Dowden*** is the most significant in this area:

- 65% of the purchase price was contributed by Dowden and the remaining was made up by a mortgage made out to both of their names; he paid interest on the mortgage and the downment premiums. They both paid towards the actual loan of the property, him contributing 27K and her 34K. Couple kept their finances totally and utterly separate.
- Relationship broke down in 2003 and question became what share he had in the property
- This outcome that she gets 65% and he gets 35% was upheld in the House of Lords who also provided a different reasoning than the Court of Appeal:

- If they had taken out what they had put in then they would have got the same amount; court denies existence of a resulting trust but give a conclusion which is the same as if they had a presumed intention resulting trust

- What the courts have said is that they are alert to the criticism this case has generated, but have justified what they did in ***Stack*** and ***Kernott v Jones*** on the basis that if Parliament doesn't step in to provide statutory reform (and the law commission has said on many times that they will not) then they will

- What Baroness Hale says in this case is that the onus is on the person seeking to show the beneficial ownership is different from the legal ownership, based on the equitable maxim that equity follows the law

    - Noted that if parties had intended their equitable interests to be different from their legal interest, then joint transferees would have spelt this out; if they had intended them to be different the parties should have said so, if not then equity follows the law

- "A conveyance into joint names indicates both legal and beneficial joint tenancy unless and until the contrary is proved"...so how, if at all, can the contrary be proved?

    - The ''presumption of resulting trust is not a rule of law''

    - Baroness Hale is beginning to cast doubt on the presumed intention resulting trust as a means of ascertaining intentions of the parties

        - Controversial aspect of her analysis of common intention is her acceptance that this intention might be imputed. This involves the attribution of an intention that they might not have shared, but which the court considers they would have agreed had they thought about the allocation of the beneficial interest

    - ''The search is to find the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it."

        - She has reintroduced the word ''imputed'' which we havent seen since ***Pettitt***

        - May be possible to displace presumption; if we can infer from all evidence before us as to how their beneficial interest should be shared than that will be done, but if not then they will impute intention

        - However, this is arguably not the role of the courts to do this despite it being to implement fairness

- In joint names cases, the question is, "did the parties intend their beneficial interests to be different from their legal interests?"

- "In law, context is everything"

- "The context is supplied by the nature of the parties conduct and attitudes towards their property and finances", and Hale leaves a list
    - Advice/discussions
    - Reasons why home was acquired in joint names
    - Purpose for which the home was acquired
    - Nature of the parties relationship
    - How was the purchase financed initially and subsequently
    - How did the parties arrange their finances
    - How they discharged the outgoings of the property
- She feels these cast light on the beneficial relationship
- In this case it cannot be said that the parties pooled their common resources, and the only thing they had in joint names was the house, the rest was kept separate. It was on this occasion intended that the man had some interest in the property, but this wouldn't be equal; split 65:35% in the woman's favour.

Thus, according to Baroness Hale in ***Stack***, the starting point is joint beneficial ownership, then it is for the person to prove otherwise

Lord Neuberger felt this was based on a resulting trust analysis. He expressly disagreed with use of common intention constructive trust in these cases. Resulting trust would have given the exact same result in this case.

- Agreed with the outcome but not with the reasoning employed to reach it – he preferred the resulting trust model and did not agree with imputing the parties common intentions.
- Crucial difference between his reasoning and the others is that he considered the resulting trust to have a significant role to play in the analysis
- Recognised that the starting point is that the beneficial interest should follow the legal interest, so that where the property is registered in the name of only one party, the other should be presumed to have no beneficial interest
- However, he went on to say that where the parties have made financial contributions to the purchase price, their beneficial interest should be presumed to be held in the same proportions as their financial contributions through the application of the presumed resulting trust
- Warned against the court imputing intention; judges arent elected and do not sit with democratic power and so do not have the power to make the law.
- Issue in this case is the orthodoxy of the law
- To impute an intention would involve a judge in an exercise which was difficult, subjective and uncertain

Practical effect of this new approach is that it is no longer necessary to find either an express agreement plus detrimental reliance or financial contributions to the acquisition of the property. The courts start with the allocation of legal title to the property and will only conclude that the allocation of the beneficial interest is different if this is what the parties can be considered to have intended, whether expressly, impliedly, or by virtue of an imputed intention.

Post *Stack v Dowden*

In *Adekunle v Ritchie* it was found that the approach from *Stack* wasn't limited to cohabitation (in this case it involved a mother and son). Starting point could be applied even in these cases

- reasoning from *Stack* applies as between mother and child relationship

In *Fowler v Barron* we see the significance of adopting this common intention approach to quantification. We had an unmarried couple who stayed together for 23 years and had 2 children. The dispute concerned a house in Bognor which was split in legal names but no declaration as to how the beneficial interest is to be held.

- Barron had essentially paid for everything but the property is transferred into joint names in legal title.
- Arden LJ says there were 2 issues:
    - Was the judge in error in seeking to determine the parties intentions by focusing on financial contributions? ''this was an error in principle on the part of the judge which requires the court to intervene here''
    - Has Barron shown a common intention for them to share the beneficial interest? No, Barron argued he only put it under the shared names if he wanted her to have the house after his death
- This case shows the effect of *Stack* in that you start 50/50, and then you must displace the presumption

In *Kernott v Jones* she bought a caravan, and 3 years later he moved in. A year later they sold it and then put down a deposit for a house. She was a hairdresser and he was an ice cream man. They later separated. In 2006 (12 years after he left her) he returns and says he has half of the house. In 2008 he purports to sever the tenancy

- In applying *Stack*– the fact that Mr Kernott left the property 16 yrs ago; Ms Jones paid all the bills for 12 yrs; raised the children on her own; maintained/repaired the property; Mr Kernott had bought another house – none of these things was sufficient to evidence an intention that the beneficial interest should now be different to what it was when they acquired the property 16 yrs earlier.
- Equity in the house is worth £218,000 by the time the case reaches court
- In the lower courts, the parties were to be taken as having intended that their beneficial interest be altered to take account of the circumstances. But is it possible to say the common intention has changed after he left her for 12 years?

- Court said there was no course of dealings, so what conduct can the court look at to see if their intention has changed? No conduct because they haven't dealt with each other for around 12 years
- Court decides to do what they feel to be fair, awarding 90:10% in favour of the woman. Arguably this reasoning didn't follow ***Stack***
- Therefore in the court of appeal, this decision was reversed. Held that therewas a lack of evidence as to the intentions of the parties
    - Accepted that if the property had been sold at the date of separation, the split of interests would be 50/50
    - However, considering the parties conduct since the date of separation, over time the 50/50 split would have become varied. The fact she had paid all the bills etc, raised 2 children on her own, repaired the house, none of these things were sufficient to evidence that the beneficial interest should be anything other than 50/50
    - Therefore he was entitled to half the share in the property
- When the case went to the Supreme court who unanimously held it should be shares 90/10. equity follows the law in the absence of contrary intention
    - Presumption of a resulting trust no longer had any role to play in domestic cases.
        - Presumption of joint ownership in law and in equity will prevail
        - Presumed resulting trusts no longer has a role
    - On the facts it was difficult to infer from the defendant's mere departure from the home
    - The court was clear that it was sometimes possible to impute an intention to the parties when trying to ascertain a common intention; didn't have to resort to imputation in ***Stack***
    - Court is driven to impute an intention to the parties which they may never have had; Baroness approach from ***Oxley*** found favour here. Court felt it had no choice but to give effect to the parties common intention by determining what would be fair in all the circumstances, however fairness per se is not the criterion
        - In the absence of evidence to support an express or inferred common intention as to quantification, "the court is driven to impute an intention to the parties which they may never have had."
- Tells us the starting point is different, and the need for detrimental reliance isnt needed

Where you have a scenario where there is single ownership then ***Lloyds*** is your starting point. They can only get that if there is an actual agreement or contribution

THE NATURE AND DUTIES OF TRUSTEES

A trustee is essentially ‘’one who is trusted’’ whilst a beneficiary is the one who trusts. Trustees are in a fiduciary relationship with their beneficiaries

In *Knight v Earl of Plymouth* the idea was stated that the role of a trustee was an onerous one; number of both common law and statutory obligations imposed on someone who is a trustee. A trustee’s role isn’t one to be taken on lightly

- Lord Hardwicke LC said that ‘’a trust is an office necessary in the concerns between man and man and if faithfully discharged, attended with no small degree of trouble and anxiety, it is an act of great kindness in anyone to accept it’’

In the case of *Bristrol and West BS v Mothew*, Millett LJ set out what a fiduciary is; ‘’someone who has undertaken to act for or on behalf of another in a particular manner in circumstances which give rise to a relationship of trust and confidence’’

- Obligation of loyalty is the distinguishing feature of a fiduciary; must not place himself in a situation where his duty may conflict and he may not act for profit for a third party
- Basically shows that, if you have been appointed as a trustee and know you are one then you know what the duties are
- If you are in a relationship of trust and confidence and your conscience is affected then you are considered a fiduciary
- In the role of a trustee one must act exclusively in the interest of a trust and they will be accountable for any breach of this duty

Appointment of trustees

The trust instrument usually details who is to be appointed.

- Create a framework for appointments on the basis of public policy

No general rule forbidding the beneficiary from being a trustee

If the sole trustee dies intestate then the property will result to the public

If there are provisions in the trust instrument which provide for the appointment of future trustees, then the instrument will prevail

Section 36(1) of the Trustee Act 1925 provides that it is possible to appoint new trustees in circumstances where an existing trustee falls into one of the following categories:

- Is dead
- Desires to be discharged
- Refuses to act as a trustee
- Is unfit to act as a trustee
- Is incapable of acting as a trustee, or
- Is an infant

Section 41 of the TA 1925 states how ‘’the court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient difficult or impracticable to do so without the assistance of the court, make an order appointing new trustee or trustees.’’

- Expediency doesn't mean necessary
- May be expedient for tax purposes for the UK trustees to withdraw, and a court to order appointment of trustees in offshore jurisdictions

Removal of trustees

Voluntary retirement of the trustee is one way obviously, under section 39 TA 1925

- They may voluntarily retire as shown in *Re Chetwynd’s ST*; you are allowed after a reasonable period to retire
- They may be removed on any grounds laid out in section 36, or under section 39 can retire on another ground but there must be 2 trustees left, with consent and it must be done by deed

A court can remove a trustee on any of the grounds in s36(1) (unfit/incapable)

Inherent jurisdiction to remove a trustee where it is equitable to do so

- Court will be reluctant to appoint offshore trustees without some assurance that the new trustees will be subject to the court
- Court will remove trustees where a trustee's personal business is in conflict with trust obligations
- Lord Blackburn in *Letterstedt v Broers* pointed out the fundamental principle in the court removing a trustee to be the welfare of the beneficiaries and the preservation of the trust property

- Courts will look at the details of the case
- "the complete change of position, the unfortunate hostility that has arisen, and the difficult and delicate duties that may yet have to be performed, their Lordships can come to no other conclusion than that it is necessary, for the welfare of the beneficiaries, that the Board should no longer be trustees."

- In *Moore v McGlynn* we see trustees being removed through setting up a business which was contrary to the trust fund they were supposed to uphold

Where the power to remove has been exercised, the trustee will be treated as having died, so that either a person with the power to appoint trustees or the remaining trustees may appoint a new trustee

The case of *Saunders v Vautier* showed how beneficiaries can come together and approve the retirement of a trustee

The importance of the trustee and the nature of trustees' duties

All these duties can be adapted or excluded by a carefully drafted trust instrument. But there are general principles that will apply where the trust instrument doesn't address what the duties are, and where the trust instrument is unsuccessful in excluding the general principles of law

- Duties of a trustee are obligatory whilst trustees also have powers and discretions which are not obligatory; certain duties are imposed on a trustee which are obligatory but there are occasions where trustees can have powers or discretions to do certain things.

General policy regarding duties of trustees may be categorised into 2 broad principles:

- Obligation to act honestly with diligence
- Obligation to act fairly and impartially

Standard of care

In relation to the powers a trustee may have, the standard of care expected may be found in a variety of places; trust must be such that the court, if necessary, can step in and administer the trust

Common law standard of care:

- In *Speight v Gaunt* the common law expression of what amounted to a standard of care was set out as ''a trustee ought to continue the business of the trust in the same manner that an ordinary prudent man of business would conduct his own''. As said by Jessel MR
- High standard is expected of a trustee looking after somebody else's money, as reiterated in *Learoyd v Whitely*

- High standard
- Prudence: caution
- Focus is on maintenance and protection of the trust fund

Statutory duty of care:

- Section 1(1) of the Trustee Act 2000 states how a trustee ‘’must exercise such care and skill as is reasonable in the circumstances, having regard in particular
  - (a) to any special knowledge or experience that he has or holds himself out as having, and
  - (b) if he acts as trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession’’
- Statute recognises that very often trustees are professionals and therefore brings the law on trustees in line with modern and contemporary developments
- There is a subjective/objective standard:
  - Reasonableness but taking account of special knowledge
- Sets a clear standard
  - Trustees will not be able to rely on their incompetence to avoid their obligations
- Those that purport to be more competent will be held to what they purported to be

The relevance of remuneration was highlighted in the case of ***Re Waterman’s WT*** where it was said by Harman J ‘’I do not forget that a paid trustee is expected to exercise a higher standard of diligence and knowledge than an unpaid trustee’’

Statute and case law:

- The general duty is contained in ***Speight***
- The duty in the TA 2000 applies to categories identified in Schedule 1:
  - Investments
  - Acquisitions of land
    - Historically land wasn't deemed to be a prudent investment, but once again contemporary adaptation and conformity of the act was illustrated through its coverage of such issues
  - Use of agents, nominees or custodians
  - Compounding of liabilities
  - Insurance

- Reversionary interests

Control of trustees

The beneficiaries can control the trustees by applying to the court—the beneficiary enforces the trust against the trustee

- Petition the court for a declaration of how the trustee should act
- *Saunders v Vautier* – termination

The court can make various orders to manage a trust:

- 1) Where the trust is no longer functioning
- 2) Claims for breach of trust
- 3) Judicial review of trust decisions
- Unwilling to engage in questions about substance especially when the decision has been made in good faith
- Court less interested in the outcome and is interested in checking that the trustees acted properly in making the decision

In the case of *Re Beloved Wilkes Charity*the trustees had to select a boy to be educated at Oxford for an Anglican charity. They set out 4 named parishes from which the boy should be selected. It was held that in the absence of evidence that the trustees acted unfairly, they must be asked if the decision was made with honesty integrity and fairness

- "The duty of supervision on the part of the Court will thus be confined to the **question of the honesty, integrity and fairness with which the deliberation has been conducted**, and will not be extended to the accuracy of the conclusion arrived at except in particular cases."
- Court is interest in knowing if the trustees acted in accordance with the principles, not so much interested in the actual decision

In *Re Londonderry's Settlement* the question was could the beneficiary see documents detailing trustees' discussion?

- No, the role of the trustee is confidential
- If the trustees do choose to disclose their decision, then they are open to scrutiny from the court

Duties of trustees

To exercise sound discretion

If a trust is created, that obligation is mandatory and this is so even if the trust is discretionary

Discretion must be exercised taking into account relevant considerations, and ignoring irrelevant considerations.

- Have a duty to exercise a sound discretion

It was said in ***Re Hastings-Bass*** that ‘’a court will not interfere in a trustee’s decisions if made in good faith, unless:

- Decision is unauthorised by the power or
- It is clear that he would not have acted as he did except for (a) taking irrelevant considerations into account or (b) not taking relevant considerations into account”
- Rule described as a safety net for advisors and trustees
- In substance the rule is used to allow trustees who have made bad decisions to get the decision undone
- This decision de facto has been used to allow the court to undo certain exercises of power that the trustees have taken when those decisions have been made in err

In ***Abacus Trust v Barr*** it was said that ‘’the rule in ***Hastings-Bass*** will not come into play where ‘the trustee made a mistake or by reason of ignorance or mistake didn't take into account a relevant consideration’’

- Did the trustee consider everything that it was his duty to consider?
- Where a trustee has done his duty, but some information was missing through no fault of his, then ***Hastings-Bass*** will not apply.

Joint cases of ***Pitt*** and ***Futter*** the rule was again restated:

- Trustees in these cases had taken professional financial advice before exercising their powers. Whilst the trustees could/did sue the advisors, they applied to the court to have their exercises made under such advice set aside
- In the court of appeal, Lloyd LJ allowed the appeal of the inland revenue, and felt the correct principle to be ‘’first the trustees act isn’t void but it may be voidable, it will be voidable if and only if it can be shown to be done in breach of fiduciary duties of the trustees.’’
    - If the trustees seek advice from apparently competent advisors, then in the absence of any other base for the challenge, he would hold the trustees to not be in breach of their fiduciary duties
    - In such a case Iwouldn’t regard the trustees act done as vitiated by the errors and voidable
- Essentially duty is to take advice when exercising sound discretion, if they have done that then they aren’t in breach of their fiduciary duty. But just because the outcome isn’t favourable isn’t any longer a ground.
- Would be up to the beneficiarys in such cases to show their trustees had breached their duty.

Investment

When deciding what/where/how to invest, the beneficiary must consider the interests of the beneficiary

Under section 3(1) of the TA 2000 ‘’a trustee may make any kind of investment that he could make if he were absolutely entitled to the assets of the trust.’’

- Can be restricted by the trust instrument, can also be excluded by the trust instrument
- Cf. Trustee Act 1961—limited power of investment
- This repealed and replaced the old trustee act, this reflects the common law position on investment and removes much of the restrictions under the 1961 act

They are under a duty from section 4(2) of the TA 2000 to invest the trust fund and to review the trust instruments from time to time and consider whether they should be varied

Trustees must be alert to the needs of all different types of beneficiaries; must be working to make the most money for the particular type of beneficiary.

Lawrence defined investment in ***Re Wragg***

- ‘’To employ money in the purchase of anything from which interest or profit is expected and which property is purchased in order to be held for the sale of the income which it will yield”

In ***Re Harari*** the deed gave power to the trustees to invest ‘’in and upon investments they see fit’’

- ‘’Prima facie those words mean what they say, that the trustees are not to be limited in any way”
- They can invest in any investment which seeming to them is a fit one according to the trust of the settlement
- To interpret the words restrictively would mean to read into the agreement words which are not there

Standard investment criteria:

Section 4(1) makes it clear that trustees must have regard to (a) the suitability of the type of investment proposed and (b) need for diversification of the trust fund

- Suitability—is the risk attached to the investment appropriate for the client to take?
- Diversity—will be dictated by the nature of the trust

Idea that trust fund is a portfolio of investments; if there are problems in any one market, the overall effect of that will not destroy the whole fund

Taking advice:

Section 5 TA 2000 stated how a trustee must obtain and consider proper advice (1) before exercising his powers of investment or (2) when reviewing the investments

- May be certain circumstances where it may be reasonable for the trustee to conclude the advice isn't sound

In ***Bartlett*** the trustees didn't sit on the board or inform themselves, the beneficiarys were able to sue the trust company on the grounds that they had failed to safeguard their investment

Breach of duty to invest:

When deciding whether a trustee has breached a duty of care when investing, the modern approach has been for the court to look at the whole range of investments.

Modern approach to investment practice is called ''portfolio theory'', according to which, investors should have regard to the composition of their investments as a whole, to determine whether they are balanced and suit the needs of the particular trust.

In ***Nestle*** court acknowledges that the trustees were given powers to invest in certain areas but they didn't realise this, and so they would be liable for the loss of correct investments. Also, the investments they had made had favoured interests of the life beneficiary as opposed to the return beneficiary. Also a lot more grounds by which she argued the fund was worth a quarter of what it initially was

- "Modern trustees acting within their investment powers are entitled to be judged by the standards of modern portfolio theory, which emphasises the risk level of the entire portfolio rather than the risk attaching to each investment taken in isolation."
- Her claim failed
- Held that she hadn't discharged the onus of proving that she had suffered loss
- At the moment she is entitled to it, she is entitled to whatever is in it
- Court of appeal said that modern trustees acting within their investment powers are entitled to be judged according to modern portfolio theory
- Legatt LJ said that ''the importance of preservation of a trust fund will always outweigh success in its advancement, the virtue of safety will in practice put a premium on inactivity

Ethical investments:

Does the TA 2000 have any impact on the extent to which the trustees may take into account the social or political nature of the investment rather than the financial return that it is likely to yield

When trustees are buying and selling trust property, they are under a duty to obtain the best price and must not be influenced by ethical or moral considerations.

- Must act in the beneficiaries' best interests, these are their financial interests

Social investing – Hutchinson and Cole's three models:

- Neutral investment policies
- Socially sensitive investment policies
    - Entitled to take other considerations into account but only after financial considerations
    - For example if all options had the same financial yield, then you could consider ethical
- Socially dictated investment policies
    - If they choose to be socially dictated they would be in breach

In *Cowan v Scargill* the national union of mine workers refused to approve an investment strategy unless it complied with certain conditions; the investment demands were rejected.

- Court held the duty to the beneficiaries was to achieve as large a return as it possible
- If the investments of the type were good for the beneficiaries then the trustees must make the investments
- Court was clear that if the financial yield was going to be less, then they would be in breach of their duty if the trustees was to take that route with a lesser yield
- There will even be circumstances where the trustees may even have to act dishonourably for the benefit of the trust
- Financial grounds only, particularly where the purpose of the trust was the provision of financial benefit

In *Harries v Church Commissioners* there was a charitable fund to help serving and retiring clergymen. There was a strong religious objection to certain forms of investment

- Court said there will be some cases where the objects of the charity will be in conflict with the investment; example of cancer research charities and tobacco shares
- If you can show that youve balanced your ethical considerations with your duty to invest, if you can also show that it is a sound investment, then this case shows you don't always have to choose the best financial option
- Some hint that other factors might be considered

The case of *Martin v City of Edinburgh DC* reiterated the considerations to be taken into account

1) In a trust to provide financial benefits the trustees have **a duty to secure the best financial interests of the trust** within the law in accordance with the trust purposes;
2) In such trusts the foregoing duty includes a duty to invest the trust assets to the **best financial advantage**;

3) As part of that duty the trustees have a **duty not to fetter their investment discretion** by ab ante decisions;

4) The duty not to fetter investment discretion includes in particular a **duty not to fetter it for reasons extraneous to the trust purposes,** including matters of political or moral judgment as distinct from financial or economic judgment (though these may interconnect or overlap); and

5) If the trustees do apply an ab ante policy — whether general or particular — they do not protect themselves from breach of trust by considering which substitute investment will serve the trust as well or better than the original.

Delegation

To what extent are trustees able to delegate their duties? What does this tell us about the way in which trusteeship is regarded and how this has changed over the past century?

At common law, delegation is only allowed if necessary

- Strict position at common law was that trustees have no right to shift their duty on other persons, but if the trust instrument expressly allows for delegation, then *Speight v Gaunt* shows how it will be acceptable if it was reasonably necessary

Section 20 Trustee Act 2000: trustees can "authorise any person to exercise any or all of their delegable functions as their agent"

- Any trustee functions except: distribution, payment of fees, appointing other trustees, delegation of responsibilities
- Discretions couldn't be delegated as *Learoyd v Whiteley* made clear
- If you think something isn't being done properly you are obliged to step in, and will be liable where they have breached their own duty in appointment of the agent
- Trustee Act contains a core set of duties which the trustee cannot delegate; they will remain responsible for them

Under section 23(1) of the TA 1925, delegation of administrative functions is allowed; trustees would take the big decision, but the actual doing could be delegated to someone with knowledge.

Section 11(2) TA 2000 sets out the remaining functions that may not be delegated

Remuneration

The general rule has always been that a trustee isn't entitled to receive payment for acting as a trustee

- However, trust instruments can provide for remuneration, and Trustee Act 2000, s28(2) states how professional trustee is entitled to reasonable remuneration
- Remuneration may be authorised by statute
- Trustee is entitled to reimbursement of expenses from trust administration

Remuneration may be ordered by the court under its inherent jurisdiction to secure the good administration of trusts as made clear in *Re Duke of Norfolk's ST*

BREACH OF FIDUCIARY DUTY

What is a fiduciary?

According to Shepherd:

- ''A fiduciary relationship exists whenever any person receives a power of any type on condition that he also receives it with a duty to utilise that power in the best interests of another"

Finn feels that a fiduciary is:

- ''Simply, someone who undertakes to act for or on behalf of another in some particular matter or matters. That undertaking may be of general character. It may be specific and limited. It is immaterial whether the undertaking is or is not in the form of a contract. It is immaterial that the undertaking is gratuitous. And the undertaking may be officiously assumed without request. "
- His definition of a fiduciary arises out of the nature of the relationship you are in with the other person and the courts looked at the relationship and saw it to be a relationship of trust and confidence. Because of the nature of the relationship one is deemed to be a fiduciary
- To him a title of fiduciary can come up on you

Birks described a fiduciary as ''one who has discretion, and therefore, power, in the management of another's affairs, in circumstances in which that one cannot reasonably be expected to monitor him or take other precautions to protect his own interests.''

In *Bristol & West BS v Mothew* it was said by Millet LJ how a fiduciary is under an obligation of loyalty; the principal is entitled to the single minded loyalty of his fiduciary and isn't subject to fiduciary relationships because he is a fiduciary. Essence of the fiduciary relationship is that the fiduciary has undertaken to act for or on behalf of somebody else in circumstances that give rise to a relationship of trust and confidence

- Must act in good faith
- Musnt profit out of his trust
- Musnt place himself in a situation where his interests and obligations may conflict
- This list isn't intended to be exhaustive but is sufficient to indicate the nature of fiduciary relations
- Personal interests of a fiduciary must not conflict with his duties to his principal

- Demonstrates the high expectations the law has of someone in such a relationship
- Principal is entitled to the single-minded loyalty of the fiduciary

What is a fiduciary relationship?

Finn said a fiduciary relationship is ‘’one of the most ill-defined, if not altogether misleading terms in our law’’

- Its accepted that this isn’t clear and you cannot pinpoint one definition, nevertheless it is important to be able to recognise a fiduciary relationship when you see one

In ***Reading v AG*** the appellant was a sergeant in the British army and stationed in Cairo and used his position to escort private Lorries through Cairo and these were smuggling spirits and drugs but because he was in his uniform the civilian police never held him liable. Court held him liable to the crown for the money he acquired through this course of dealings

- In this case the relationship between a government employee and the crown was a type of relationship which gave rise to a relationship of trust, loyalty and confidence
- The fiduciary relationship was in addition to the already existing contractual relationship between the parties
- Court said the nature of the relationship gave rise to a fiduciary relationship above and beyond the contractual relationship; had to give back to the crown any profits he had made from his activities

Contrast the above reasoning with that in ***Re Goldcorp***. Lord Mustill said no doubt one person is placed in a position doesn’t necessarily mean that he doesn’t owe fiduciary duties to another by virtue of being in that position

- ‘’The essence of a fiduciary relationship is that it creates obligations of a different character from those deriving from contract.”
- Fact you’re in a contractual relationship doesn’t preclude finding one to be in a fiduciary relationship
- High expectations were held here not to necessarily lead to equitable obligations
- Court acknowledges that the people put faith and trust in Goldcorp, but was clear that the words were misleading in this context as high expectations by the customers don’t necessarily lead to equitable obligations

In ***AG v Blake*** we see a mere contractual agreement per se to not give rise to a fiduciary obligation. Whilst employed in the secret service he was imprisoned for 42 years in Russia but managed to escape and write his autobiography. Crown sought to prove that Blake was in a fiduciary relationship with the crown and shouldn’t be allowed to profit from breach of that fiduciary relationship.

- Court of appeal said that Blake’s employment did render him subject to a fiduciary relationship but his fiduciary relationships didn’t endure beyond the termination of

his contract of employment; at the time he made this promise he was not in that fiduciary relationship

- Would be unreasonable to say that the fiduciary relationship would last forever in the context of employment
- Lord Woolfe said in this case that equity doesn't demand a duty from a former employee to his former employer
- On appeal to the house of Lords, the question wasn't in regard to whether or not Blake was a fiduciary, but if it had come to them on that basis they would have found him to be one arguably on the grounds of policy

Nature of fiduciary duty

What exactly are the expectations of a fiduciary?

In *Bray v Ford* it was held that a fiduciary isn't allowed to put themself in a position where their interests and duties can conflict

- Essentially saying one doesn't impose the fiduciary obligations on the basis of grand moral ideas, but simply because we are human and are prone to being swayed
- Lord Herschall said that ''it is an inflexible rule of a court of equity that a person in a fiduciary position isn't, unless otherwise expressly provided, entitled to make a profit; he isnt allowed to put himself in a position where his interest and duty conflict''
    - No profit and no conflict rules
- Fiduciary must not in any circumstances make any profit for himself out of the relationship

There are a few general areas where the duties of fiduciaries have arisen

- Unauthorised remuneration
- The self-dealing rule
- The fair-dealing rule
- The rule in *Keech v Sandford*
- Business opportunities
- Bribes

''No profit'' and ''no conflict'' rule:

Both the duties of no profit and no conflict have been interpreted very strictly, so that the fiduciary is liable even though he or she was acting honestly and to the best of his or her ability, without fraud or bad faith

- Fiduciary duties are prophylactic meaning they exist to prevent a particular state of affairs from occurring; equity seeks to prevent disloyalty by imposing the most severe duty of loyalty

- Samet feels the strictness is a warning against getting involved in such situations in the first place; equity is concerned to ensure that the fiduciary doesn't place himself or herself in a position in which he or she might be tempted to be disloyal. Fiduciary duties are imposed so as to ensure that the fiduciary remains personally disinterested throughout the time during which he or she is working for the principal

DUTY 1) Unauthorised remuneration:

Historically the rule was that the fiduciary would always act voluntarily

- In *Barrett v Hartley* the court said all one had done was merely what was expected of him; fiduciary is supposed to act in the interests of other people and don't need to get paid for it

- In *Dale v IRC* Lord Norman said it is not that the reward for services is repugnant, but he who has the duty shall not take any remuneration contrary to law or authorised

    - Not an absolute ban, and in some cases if remuneration is authorised by the deed or court then it will be alright

Both the common law and the trustees act (section 31(1)(a)) provide for instances where remuneration can be allowed

- If someone takes on a particular fiduciary role, such as giving advice etc, that person may apply to the court to be remunerated and to be awarded payment

- In *Re Duke of Norfolk's ST* it was said that ''in exercising that jurisdiction the court has to balance two influences which are to some extent in conflict. The first is that the office of trustee is, as such, gratuitous; the court will accordingly be careful to protect the interests of the beneficiaries against claims by the trustees. The second is that it is of great importance to the beneficiaries that the trust should be well administered''

    - In the beneficiarys interest that they have someone with knowledge looking after their fund but it is a task to burden a fiduciary with such a task; need for balance

In *Guinness v Saunders*, a man was a solicitor and member of a committee of the board of directors of Guinness PLC and at one time had been a non-executive director of it. The man (Ward) offered his services in setting up some transaction of another company; for his work he submitted an invoice for £5.2 million.

- Conflict in that he was working for Guinness but he submitted a large invoice so as to further his interests of maximising his commission

- In both the court of appeal and house of Lords, Ward's claims failed

- House held that the non-executive director wasn't entitled as his position led to a derogation of his duties

- Rules are strict in regard to conflict of interests

In *Re MacAdam* the testator in his will had set up a trust company and the trustees in this case had been given powers to appoint directors of the company; appointed themselves and gave themselves a wage. Not allowed to make a profit from being in a fiduciary relationship!!

- Question was ''did the trustee acquire the position in respect of which he drew the remuneration by virtue of his position as a trustee?''

Section 29 makes it clear that corporations etc are entitled to receive reasonable remuneration

DUTY 2) Self-dealing rule

A trustee cannot buy trust property; a trustee cannot be both vendor and purchaser. The court can set aside the sale at the request of the beneficiary

In the case of *Ex Parte Lacey*, Lord Eldon set out the basic rule on conflict of duty and personal interest. It is irrelevant that the trustee is honest and that the sale is at a fair price.

This was brought about through the case of *Tito v Waddell* where it was stated that ''the self-dealing rule is that if the trustee sells the trust property to himself the sale is voidable by any beneficiary as of right, however fair the transaction''

- Essentially, if one is looking after trust property and it becomes necessary to sell one of those assets to support the fund, there is a real temptation that you as a trustee may want to purchase that trust property, and this was dealt in *Tito*

- In this case Megarry VC set out the 2 rules: self-dealing which makes it voidable by the beneficiary. If the trustee sells trust property to himself, that it automatically voidable and the beneficiary can rescind that transaction regardless of how fair the transaction was

The self-dealing rule provides that a fiduciary is barred from dealing on behalf of himself or herself and the principal in the same transaction

- The logic behind this rule is that there is a real danger of conflict between the personal interest of the fiduciary in getting the cheapest price and his or her duty to the principal to obtain the highest price for the property.

In *Kane* the defendant was the administrator of her husband's estate (fiduciary) and was also the step mother of his children. The estate didn't amount to the £125k she was entitled to, as the estate was just £90k. She proceeded to appropriate the shares to raise more money; step-son argued that this transaction was voidable on the basis of self-dealing

- The step-son's action succeeded

- In taking the shares in satisfaction of her statutory legacy, she was entering into a transaction where her duties to the other beneficiaries and her own interests conflicted

In *Holder v Holder* we see a flexible approach. Victor was a sitting tenant in these 2 farms, and as an executor, he took minor duties before renouncing his role as an executor. He made a successful bid for one of his farms which was above the reserve price. His mother then applied to have transaction set aside

- Her application was rejected
- No conflict as other beneficiaries weren't looking for victor to protect their interests
- There was no de facto relationship of trust and loyalty between him and other beneficiaries
- Characteristics that would normally impose this obligation on him were not present
- Held he hadnt breached the self-dealing rule by purchasing the farms; he hadnt assumed any of the duties of executor, he had acquired no special knowledge relating to the transaction whilst he had been acting executor, and had never made any secret of the fact he intended to purchase the farms
- This decision appears to undermine the strict interpretation of fiduciary duties

DUTY 3) Fair-dealing rule

Here the trustee can purchase from the beneficiary provided they can show that they obtained no advantage by reason of their position

Comes from the same case of *Tito v Waddell* where it was said that ''the fair-dealing rule is that if the trustee purchases the beneficial interest of any of his beneficiaries, the transaction is NOT voidable as of right, but can be set aside by the beneficiary unless the trustee can show that he has taken no advantage of his position and has made full disclosure to the beneficiary, and that the transaction is fair and honest''

- Real overlap between explicit duties of a trustee which they know to be imposed on them, and other people who de facto find themselves in these complicated relationships who may not know they are responsible under such rules
- These rules derive from the status and position of being a trustee and fiduciary, Megarry VC went on to say that both self dealing and fair dealing have a common origin in that equity stops the abuse of positions

In *Thompson v Eastwood* court seeks to make sure the person in such a position hadn't taken advantage of it

- For example, if a trustee purchases a beneficiary's interest in the trust property, the transaction can be set aside by the beneficiary unless the trustee can establish the fairness of the transaction

DUTY 4) The rule in *Keech v Sandford*

This rule prevents a trustee taking a benefit which came to him by virtue of his position

Any profit you make you will have to disgorge to the principal or beneficiary. But this rule extends this principal in that if the fiduciary gains a benefit for himself which couldn't have been utilised by the beneficiary, he will be personally liable, regardless of the fact the defendant acted reasonably and in good faith, and even though the principal would not have been able to exploit the opportunity himself or herself

- Trustee in this case held title to some market on trust for some infant beneficiary. When the trustee tried to renew the lease for the infant beneficiary the landlord refused it but proceeded to write it in favour of the trustee
- Trustee had the opportunity to acquire the renewed lease for himself by virtue of his position as trustee
- Because you're in a position of trust loyalty and confidence, if there is a profit to be gained, it is in your duty as a fiduciary that such a profit is only for the beneficiary and not you
- You're not allowed to make a profit because of your fiduciary role
    - Held he had to contribute to the infant's fund any profits from the building because the trustee was regarded as holding it on trust for him
- It was said that it ''may seem hard that the trustee is the only person of all mankind who might not have the lease; but it is very proper that the rule should be strictly pursued and not in the least relaxed."

Where an opportunity comes along to make profit, the rule in ***Keech*** states that even if the beneficiaries couldn't have had the profit for themselves, neither can you

The rule also extends to situations where the lease has come to an end but there is an opportunity to buy the freehold reversion. If the trustee holds the lease on trust for the beneficiaries and the lease runs out, he cannot buy the freehold for himself. Shown in ***Protheroe***

- Shows how harsh this rule actually is
- CANNOT make a profit

DUTY 4) Other business opportunities

If the fiduciary is presented with a business opportunity that he only has due to his position, then any profit he makes will belong to the beneficiary or principal even if they didn't want to take advantage of it for themselves.

- In England and Wales the law remains very strict

It was said by Lord Russell in the case of ***Regal (Hastings) Ltd v Gulliver*** that ''the directors standing in a fiduciary relationship to Regal and having obtained these shares by reason and only by reason of the fact that they were directors of Regal and in the course of the execution of that office, are accountable for the profits which they have made out of them."

- Concerned Regal Ltd, a company which owned a number of cinemas and wanted to buy 2 additional cinemas in Hastings to add to one they already owned in the area

so as to sell them all off as a group of 3. The company's individual directors took up the opportunity to invest on their own behalf, they were then held liable to account for the profits made, to Regal Ltd

- Directors only had the opportunity to buy into this venture because they were directors
- If they hadn't been directors they wouldn't know anything about the deal, as company directors they are therefore in a fiduciary relationship with the company and the shareholders of it
- Directors invest their own money but have made a personal profit due to the fact they are regarded as having their interests conflicting
- If it had been anyone other than a fiduciary it would have been fine
- Court was of the opinion that ***Keech*** made it clear a fiduciary wasn't allowed to make a profit
    - Strict application of the rule has been questioned as being appropriate in such circumstances

In ***Boardman v Phipps*** the trustees held minor shares in a company. They were advised by their advisor for their fund to purchase more shares in the company with a view of taking larger control. Trustees decided they didn't have the power and so refused. After consultation with the trustees, the solicitor personally acquired the shares and controlling interest in it. Bought in a large profit for himself and the trust.

- By a fair majority, held that the solicitor was a constructive trustee made out of the shares he made for himself
- The very opportunity to make profit etc had come to his role as a solicitor fiduciary to the trust; put himself in a situation where his personal interests and duty were in conflict
- Shows a very harsh approach
    - But justified on the basis that the defendants were clearly fiduciarys who had profited from the exploitation of an opportunity they had obtained as fiduciaries and when they would have been able to avoid liability had they obtained the fully informed consent of the beneficiaries
- But the court were genuinely sympathetic, however the rule is strict!

In ***IDC v Cooley*** all the firms work had been in the private sector and they wanted to break into public sector work.

- Sometimes it may be commercially wise to allow people to take advantage of business opportunities so long as it doesn't conflict with their duties and obligations

DUTY 4) Bribes

In situations involving bribes, there is no way of saying the fiduciary was acting on behalf of the principal

In *Lister v Stubbs*, Stubbs was employed as a foreman by the plaintiff company to buy materials. One of the suppliers paid Stubbs so as to make the company buy the supplies from them. Stubbs spent the money on land, and the court of appeal held he didn't hold it on constructive trust for Lister, but he was personally liable to account as the relationship between him and his company was creditor and debtor

- In the case of a fiduciary receiving a bribe, the relationship is one of creditor and debtor, the claim of the principal is personal not proprietary
- Courts reasoned that they weren't prepared to impose a constructive trust on the bribe money as it was money which the principal never owed
- Need to distinguish between proprietary or personal remedy

The case of *AG Hong Kong v Reid* concerned someone who received a bribe for not prosecuting certain criminals

- Lord Templeman clearly had policy considerations in mind when he said that ''it would appear to follow that the bribe and the property from time to time representing the bribe are held on a constructive trust for the person injured''

Obiter from *Daraydan* approved the above case

- Defendant in this case was an agent who received a secret commission of 10% of the contract price in return for him exerting his influence to obtain contracts between a third party and his principal.
- Secret commission was held to be an unauthorised profit that could be recovered by the principal; irrelevant whether the agent had solicited the secret commission or had been offered it by the third party

And in *Sinclair* the court of appeal resolutely declined to follow the principle from *Reid*, shows how we are back to *Lister* reasoning

Remedies for breach of fiduciary duty

To undo the unjust enrichment the law requires the fiduciary to make restitution to disgorge the profit made and there are 2 ways in which this can be effected:

1) Account for profits. However this relies on solvency of the fiduciary. This is a personal remedy which only works if the fiduciary is solvent
2) Constructive trust on the profits. This is a proprietary remedy. Court will make you a trustee merely holding legal title on constructive trust for the benefit of the beneficiary or principle.

How do the courts decide which remedy to award?

- Panesar says that no constructive trust will arise if the actions of the fiduciary aren't connected to their role

ACCESSORY/STRANGER LIABILITY: DISPOSAL OF TRUST PROPERTY IN BREACH OF TRUST

In certain circumstances a constructive trust can be imposed where the court considers that trust property has been wrongly acquired or retained by a third party

Accessory or stranger liability is essentially where a person who isn't a trustee or fiduciary may find themselves liable to account to a beneficiary or a principle if they have assisted with the breach of a trust or fiduciary duty

Personal liability of third parties may take 2 forms:

1. Receipt based liability

- Where a third party has received property in which the beneficiary or principal has an equitable proprietary interest, but the third party no longer has that property or its traceable substitute, the third party may be liable to the claimant for the value of the property received if it was transferred following a breach of trust or fiduciary duty

2. Accessorial liability

    - Where the third party has encouraged or assisted a breach of a trust or fiduciary duty, he or she may be personally liable to the beneficiaries or principal for the loss arising from the breach.

Is the remedy of the wronged party personal or proprietary?

A third party can be held liable to account or through a constructive trust to the wronged party

Any third party who receives property will receive it subject to the existing beneficial rights

- Beneficiary's right is in the property; proprietary remedy will always be the most attractive remedy
- Only exception to above statement is equity's darling; if property has gone to someone who has given consideration for the property and proved to have notice of the property being received in breach of a trust. This is the only person who can defeat the proprietary interest of the beneficiary
- Third party will receive the title subject to the beneficiary's beneficial interests

If your right is in the property and the property has been destroyed/spent, that will bring your rights in the property to an end. Can still have a claim against the person however

In *Selangor* it was said that strangers would be held to account as constructive trustees:

- They are liable as if they are trustees
- It was said ''this is nothing more than a formula for equitable relief. Court of equity says the defendant shall be liable in equity as though he was a trustee''
- Court recognises that in making a person personally liable as a trustee, the court is acknowledging that this is not a trust as we know it
- Works simply as a tool of convenience and as a means of making sure the deprived beneficiary can claim their benefit back

So if your right is proprietary, it goes with the property, if it is personal, the court will construct it against the stranger and make them liable

- This is a legal convenience

In *Polly Peck* Scott LJ described this personal remedy as ''the in personum constructive trust claim.''

In *Dubai v Salaam* Millett LJ agreed with this terminology and said we should discard the words ''accounted as a constructive trustee'' with ''accountable in equity''

Older cases recognise this is a fiction, and newer cases say this is an unnecessary confusion to hold someone to be a constructive trustee; simply hold them as accountable in equity

Courts generally still favour the use of constructive trustee language, and Lord B-W stated in *Westdeutche* that one of the fundamental principles of trust law is that there should be some identifiable subject matter, there was an exception where constructive trusts arose due to dishonest conduct of one of the parties

When will liability arise?

In the case of *Barnes v Addy*, Selbourne LJ said ''strangers are not to be made constructive trustees unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees."

Three situations where a stranger may become liable:

1. Trustee de son tort
    - Takes it upon themselves to act as a trustee and deal with the property in a way suggesting they have a right to; they will be liable for the breach despite not being a trustee
    - If you act like a trustee and do something in breach you will be treated like a trustee and liable for the breach
2. Dishonest assistance
    - Where a dishonest person participates in a breach of trust committed by a trustee
    - Will be held accountable personally for any loss
3. Knowingly receiving trust property
    - If someone receives the property with such knowledge, they will be held accountable accordingly

Selbourne was clear that liability will not be imposed without fault on the part of the stranger; one must assist with knowledge of what they are doing

Multiple claims/remedies

Now, we have alluded to the fact that there may be different types of claims and remedies available to beneficiaries who have lost trust property as a result of a breach of trust. It may seem appropriate in circumstances where a stranger has actually **received** the trust property to say that they hold that property on constructive trust for the benefit of the original beneficiaries. But where the stranger has **assisted** in a breach of trust and may not actually have any trust property, then a constructive trust might not appear quite so appropriate – as there is no property over which to construct a trust. As seen in *Selangor* – the courts have taken a pragmatic approach and we saw Justice Ungoed

Thomas admit that calling a stranger a constructive trustee was a mere formula for equitable relief.

We will see, as we go though the law in this area, that there may be a variety of different claims and remedies for beneficiaries. As noted, there may be proprietary remedies in the trust property, there may be a personal remedy against a stranger by holding them to be a constructive trustee of the property; we noted that even if a stranger has passed the trust property onto another person or has exchanged it for something else, that the equitable processes of following and tracing (which we will look at later) will allow the beneficiary to re-claim their property/or its substitute and there is also a legal common law claim for money had and received.

Trustee de son Tort

The case of *Barnes* identified this as where a person who isn't a trustee but intermeddles with administration as if he were a trustee would fall into this category

In *Mara* this concept was explained:

- "If one, not being a trustee, and not have authority from a trustee, takes upon himself to intermeddle in trust matters or do acts characteristic of the office of trustee, he may thereby make himself what is called in law a trustee of his own wrong – i.e. a trustee de son tort, or, as it is also termed a constructive trustee."

In the case of *Blyth v Fladgate* a firm of solicitors held exchequer bills which were the property of a trust. All 3 trustees of this particular trust had died. One of the beneficiaries asked for the bills to be sold and the money advanced to a mortgage. The solicitors complied with this request but the money raised was insufficient and the court held the partners were personally liable to make up the shortfall in the sale

- In taking up the action to sell, the solicitors were trustees
- They took up all the characteristics, responsibilities and liabilities as if they were trustees
- Could not be argued that they were acting as agents for the trustees as the trustees were dead
- In their role it was their duty to see the money applied and properly realised

Dishonest (knowing) assistance

Was suggested this terminology was adapted so as to give a remedy against the stranger where there would otherwise be none

- Elliot and Mitchell have suggested that equitable accessorial liability is a form of civil secondary liability, in which the assistant is held jointly and severally liable along with the trustee or fiduciary whose breach of duty is assisted. This presents theoretical and practical difficulties

Barnes said a stranger wouldn't be liable under this head unless they assisted with a dishonest/fraudulent design; the stranger has to know the trustees are involved in the dishonest/fraudulent activity

In *Baden* Peter Gibson J isolated 4 elements which were recognised to give rise to liability:

(i) Existence of a trust

(ii) Dishonest/fraudulent design on part of the trustee: must be some unauthorised misapplication of the trust property

(iii) Assistance by the stranger in that design: this is a question of fact

(iv) Knowledge of the stranger: most controversial element of this liability as one must ask what level of knowledge the stranger is required to have

What kind/level of knowledge is necessary?

There is indeed a wide spectrum of potential liability. In *Baden*, different types of knowledge were touched on:

- Actual knowledge
- Nelsonian knowledge
    - Knowledge which the stranger would have obtained had he not shut his eyes to the obvious
    - The law recognises that in certain circumstances you might not have actual knowledge but the reason for this is that you chose not to look
- Wilfully/recklessly failing to inquire
    - Were you in a situation where you ought to inquire?
- Knowledge of facts that would indicate the fact to an honest/reasonable man
    - Not about failing to inquire but rather about the stuff one does know and reaching the right conclusion
- Knowledge of the circumstances that would put and honest/reasonable man on inquiry

It has been accepted that in the cases of the first 3 bullet points we are looking for evidence of actual knowledge, but in points 4 and 5 it is clear that the stranger wouldnt have actual knowledge and the court would be imputing a level of knowledge to the stranger

- Raises issues of fairness regarding imputing knowledge

In *Agip v Jackson* Peter Millett explained why in the first 3 cases only, the imposition of liability is preferred

- If a man doesn't draw the obvious inferences or make the obvious inquiries, then why not. But if he merely regarded something as none of his business, then that is quite another. Categories 2 and 3 are dishonest and those guilty of that behaviour cannot complain if they are treated as having actual knowledge

In *Selangor* the defendant was involved in a sophisticated fraud. He was found to be in breach of his fiduciary duties but the question was if the third party bank was liable for

knowingly assisting him in this dishonest endeavour. Bank was found to have acted in good faith without knowledge, but was still liable for assisting

- On the basis of an objective inquiry, a reasonable bank would have been aware of the fraud instigated by the defendant
- Criticised for being too harsh and placing too onerous a burden on them to check every single transaction that may come their way

Approach was followed in *Karak Rubber Co v Burden*. The third party were Barclays and Karak went after the bank saying they had assisted and Barclays was found liable

- Enough that the bank had constructive knowledge of the dishonest and fraudulent design
- Bank had knowledge of circumstances which would have indicated to an honest and reasonable man of the dishonest nature
- Enough that they SHOULD have had knowledge, despite them not actually having it
- Court feels able that the bank SHOULD have known

The above cases demonstrate the serious nature of such liability

By 1990s the courts were beginning to notice the difficulties in this area

As for whether the 3rd party themselves were dishonest; examine their actions and decide if they had acted honestly or dishonestly

- Shift in emphasis from what they knew about the trustees actions towards a situations where they focus on the 3rd parties actions

In *Agip v Jackson* the plaintiff was an oil company with a bank account in Tunisia. Agip's chief accountant altered name and fraudulently moved around £10million. Others were assisting in the misapplication of money, but what level of knowledge was needed?

- Found they were at best, indifferent
- ''The true distinction is between honesty and dishonesty''
- Shows a shift when he says ''its not about what they knew or whether 3rd party had knowledge, it is about whether the 3rd party themselves were honest or dishonest''
- Accepts the classification but lays out the true distinction and this had the nature of being a question for the jury
- This case disapproves of basing liability on categories 4 and 5 as they are akin to negligence and should be sufficient to endorse/uphold stranger liability

In *Lipkin Gorman v Karpnale* the law in this area was assessed:

- In my view, want of probity is a key aspect in the approach the court should take". Alliott, J.
- "There is at least strong persuasive authority for the proposition that nothing less than knowledge, as defined in one of the first three categories stated by Peter

Gibson J in *Baden's* case, of an underlying dishonest design is sufficient to make a stranger a constructive trustee of the consequences of that design".

In *Polly Peck* an action was dismissed against a freezing order against the bank

- Judge said that liability for knowing assistance should need something amounting to dishonesty for want of probatim

These cases show the shift in reasoning; grounds for liability are shifting slightly

In *Royal Brunei Airways v Tan* which was very influential in this area concerning dishonest assistance, the matter at hand was an agreement between travel agents and the airline, and would hold the proceeds on trust for the airline in a separate bank account. It was agreed that this was an express trust but instead of putting it in a separate bank account the company put it in their own current account and used it to meet their own day to day expenses. When the company became insolvent the airline company sued the company and its director

- Was no proof of a dishonest and fraudulent design
- Test in *Barnes* requires that the director had a dishonest and fraudulent design and he assisted in it; no evidence of a fraudulent or dishonest design which he assisted in
- Issue was whether the breach of trust (a prerequisite) must itself be a dishonest and fraudulent breach of trust by the trustee
- Lord Nicholls delivered the important judgment and concluded that the test needed to be essentially changed
    - Held that the trustees state of mind is essentially irrelevant to the question as to whether the 3rd parties should be liable for breach of trust
    - "If the liability of the third party is fault-based, what matters is the nature of his fault, not that of the trustee".
    - Using dishonesty in a question can provide a meaningful answer
    - Did not recommend the use of the word ''knowing''
- "The tide in England has flowed strongly in favour of the test being one of dishonesty".
    - Dishonesty was a sufficient condition for liability but problems arise as to what is meant by dishonest
    - Whatever meaning of dishonesty is in other contexts such as criminal law in this context dishonesty means simply not acting as an honest person would in the circumstances
    - This is an objective test

- Did acknowledge that dishonesty had a subjective element; carelessness isn't dishonesty
- He said ''these subjective characteristics of dishonesty do not mean that individuals are free to set their own standard of honesty in particular circumstances''
- Sufficient that a breach of trust has occurred without needing to consider the nature of that breach
- This was merely a privy council decision however

Subsequent interpretation can be found in the House of Lords case of *Twinsectra v Yardley* which saw Lord Huttin establish the combines test bringing together objective and subjective elements which changed the test from the previous decision and essentially left the law in disarray

- Subjective standard:
    - "Whereby a person is only dishonest if he transgresses his own standards of honesty, even if that standard is contrary to reasonable and honest people."
- Objective standard:
    - "Whereby a person acts dishonestly if his conduct is dishonest by the ordinary standards of reasonable and honest people."
- ''There is a standard which combines an objective and subjective test, and requires that before there can be a finding of dishonesty it must be established that the defendant's conduct was dishonest by the standards of reasonable and honest people and that he himself realised that by those standards that his conduct was dishonest. I will term this the combined test"

In *Barlow v Eurotrust* it was concluded that the house in *Twinsectra* never intended their reasoning to be different from *Royal Brunei*. Blames the academics for misrepresenting what the House of Lords actually said

- ''Liability for dishonest assistance requires a dishonest state of mind on the part of the person who assists in a breach of trust. Such a state of mind may consist in knowledge that the transaction is one in which he cannot honestly participate (for example, a misappropriation of other people's money), or it may consist in suspicion combined with a conscious decision not to make inquiries that might result in knowledge. Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards."
- Lord Hoffmann eventually approved an objective test
- This reasoning has been considered twice and approved both times in *Abou-Rahmah v Abacha* and *Starglade v Nash*

Order has arguably been restored following the above case and its reasoning

Knowing receipt

The standard for deciding on knowledge seems to be objective; need actual or constructive knowledge

This area is in regard to strangers who receive trust property knowing it comes from a breach of trust

This is an Imposition of a constructive trust upon the stranger who has received the property. If a stranger in receipt of trust property was a volunteer. Beneficiary's rights in their property are not conditional on the beneficiary being at fault.

- Only equity's darling can defeat this
- Beneficiary is entitled to assert their right in the property, but an innocent party who received the property isn't personally liable
- To decide if a person is a constructive trustee, they would have had to receive the property with a requisite degree of fault and this requires unconscionable behaviour and knowledge that the property was on trust

This area too has gone under many changes

Cases such as ***Re Montagu*** have held that constructive fault isn't sufficient and that a subjective test applies, so it must be established that the defendant actually knew or suspected that the property had been received in breach of trust or breach of fiduciary duty

- "Suppose a trustee transfers trust property to a person who takes it in all innocence, believing that he is entitled to it as a beneficiary, he cannot claim to be a purchaser for value without notice, for he is a mere volunteer. If, when the truth emerges, he still has the property he must restore it, whereas if he no longer has either the property or its traceable proceeds, he is under no liability – unless he has become a constructive trustee."

If a stranger receives trust property but subsequently dissipates it so that there is no property or substitute property yet, then there can clearly be no proprietary remedy as there is no substitute on which to assert any right. Therefore we then look at personal remedy

In ***International v Marcus*** the fact the person was paid with 5 company cheques should have put them on alert. They were held to have actual knowledge and should have put the company on alert

In ***El Ajou*** circumstances were touched on where strangers would be found to assist in a breach of trust, LJ Hoffmann talked about these circumstances

- Plaintiff was the largest single victim of fraud, and the profits were laundered through a chain of international transactions and then finally English people who claimed they were bona fide investors
- Hoffmann then laid out the 3 circumstances which need to have taken place:
    - A disposal of assets in breach of fiduciary duty

        - Assets that were subject matter were actually disposed of in breach
        - Straightforward
        - Can see plainly whether someone has taken money belonging to another
    - Beneficial receipt by the defendant of assets which are traceable as representing the assets of the claimant
        - Property must be received by the defendant for his or her own use and benefit rather than ministerially
            - Means that if the property is received by the defendant merely as agent for another, the defendant cannot be liable for unconscionable receipt unless the defendant subsequently misappropriates the property for his or her own use, since then the defendant will be benefitting from the property
        - Idea is that recipient must receive and retain property for their own benefit before liability can arise; stated by Millett J in ***Agip***
            - Banks couldn't be held to account as they were a means through which money passed and agents for their customers
        - Pearson Stevens said ''exoneration of agents from liability may unduly limit the operation of personal liability for knowing receipt, and the reasoning of Millett isnt wholly sound as when the bank take the money it is theirs as they have the power to invest it''
        - Law is unclear at the moment, but it seems you need to receive the property for your own beneficial interest, and this may exclude agents from being liable on a transient level
    - Knowledge on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty
        - Remains, on the most part, a part of receipt based liability. There is another debate in this area as to whether the recipient should be at fault
        - At first, if you receive you are liable (strict liability) but then you are given the opportunity to provide a defence
            - This approach hasnt found total favour, but there is indeed a discussion going on in this area
        - What doesn't a recipient need to know?
            - Was said in the case of ***Eagle Trust PLC*** that "unlike a 'knowing assistance' case it is not necessary, and never has been necessary, to show that the defendant was in any sense a participator in the fraud." All that needs to be known is the payment was trust money

        - Not necessary to show the defendant was in any sense a participator in the fraud
        - No need for dishonesty as there is in dishonest assistance
    - Liability will only attach where there is relevant knowledge
    - If you receive not knowing and then pass it on never knowing it was a breach of a trust, there will still be no liability
    - Where there is an honest muddle, Megarry J said this wouldnt amount to liability
- Court held ''ought to have known wasnt really enough. In the case of this type involving a personal transaction, it must be shown he knew it was trust money being misapplied. Knowledge would be shown to exist where the alleged constructive trustee had: 1) actual knowledge 2) had he wilfully shut his eyes to the obvious 3) had he wilfully and recklessly failed to make the type of enquiries that an honest and reasonable man would have made'' said in ***Polly Peck***

- Found that Dollar Land Holdings did have knowledge
- This case sets out plainly the requirements one is looking for to determine if someone would be in knowing receipt

In the case of ***BCCI v Akindele*** it seems to have laid down the definitive test for knowing receipt, but what was less clear is what unconscionable means?

- ''The recipients state for knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt."
- Strong argument that deciding what is unconscionable isn't decisive as to what a person known
    - No requirement of dishonesty
- Rejected the fivefold classification in ***Baden***
- Held that the appropriate test is one of unconscionability as regards the retention of the benefit of the property received
    - Although no indication was given as to what amounts to unconscionability, it is clear that a subjective test was contemplated
    - Clearly a defendant's receipt will be considered to be unconscionable if he or she knew of the breach of trust or fiduciary duty and, presumably, also if he or she turned a blind eye to the breach
    - Still not clear whether suspicions of the breach by the defendant can be considered to have been unconscionable

Strict liability/restitution at common law/restitution in equity

Where the defendant is held liable for unconscionable receipt, the remedy is a personal liability to account for the value of property received. It is a gain-based, restitutionary remedy. There is no obligation to transfer specific property to the claimant.

With restitution we are looking at the gain of the defendant

- This is only available where the enrichment of the defendant is unjust

Unjust enrichment is the cause of action and restitution is the remedy

This is a legal action

So changed his position that it would be unequitable to deny restitution

The case of *Lipkin Gorman v Karpnale* confirmed unjust enrichment as an independent cause of action

- Strict liability in law
- Currently requires fault in equity

BREACH OF TRUST: TRACING

Where property is taken from the beneficiary or principal, if that person has a proprietary right in the property, that right travels with the property

- If it is taken in breach of trust and received by a third party, there is a proprietary claim to take your property back

Function of law of tracing is to enable the owner of the property to take it back

Hudson notes that tracing operates on 3 levels:

- Owner may be seeking to recover their original property from the defendant
- Owner may be seeking to recover their original property PLUS any profit which may have been realised from the defendants use of the property
- Owner may seek to establish a proprietary right in some other property which the defendant has acquired by using the original property

Remedies for breach of trust

1) An injunction to restrain the breach
2) A personal remedy against the trustee
3) Possible a personal remedy against the recipient of the trust property
4) A proprietary remedy against the trust property

A personal claim is enforceable against the defendant personally. A proprietary claim is enforceable against a particular item of trust property that is under the trustee's control.

Tracing and following: preliminaries

Tracing and following are processes (rather than remedies or claims) by which the claimant locates an asset/property that either is or represents an asset/property belonging to the claimant to which he or she asserts ownership.

Following involves locating how the original asset has changed hands

Tracing is the process identifying how a new asset is the substitute of (essentially the exchange product for) the original

- Until recently, tracing was used to identify both the property of the claimant and the remedy to that property
- Nowadays, following and tracing are processes concerned in identifying property or its substitute, and the claim and remedy of getting it back is a separate method

Lord Millet stated in his speech in *Foskett v McKeown* that following and tracing are:

- "Both exercises in locating assets which are or may be taken to represent an asset belonging to the claimant and to which they assert ownership. The processes of following and tracing are however distinct. Following is the process of following the same asset as it moves from hand to hand. Tracing is the process of identifying a new asset as the substitute for the old."
- Mr Murphy controlled a company to acquire land. Land was bought but there was no development on it, and the funds given were found to have dissipated. Meanwhile he took a life insurance on himself to the value of £1m and committed suicide. It was later discovered that he used £20k of their investment money to pay his life insurance premiums.
- Received money on a purpose for trust and estimated that 40% of premiums paid were the money of the investors; if they had a right in that money, that right follows the money. If their investment contributed to the £1m then they were entitled arguably
- At the court of appeal, Scott VC held that Mr Murphy had declared an express trust of the policy to his children and this couldn't be divested.

    - Given that once he has made the first premium payment, the insurance would pay out anyway, so it matters not that the rest came from the investors trust fund

- At the House of Lords, they found in favour of the investors. State above quote
- Sets out clearly what tracing and following are
    - Following: if you gave a painting to x who gave it to y, they can follow the painting and identify it in the hands of y. Same property, but in hands of different people
    - Tracing: beneficiary can trace the value of the painting, if sold, into the hands of someone else, or if it is traded for a car, you can trace the value into it
- "Tracing is neither a claim nor a remedy. It is merely the process by which the claimant demonstrates what has happened to his property, identifies its proceeds and the persons who have handled or received them, and justifies his claim that the proceeds can properly be regarded as representing his property."
    - Proprietary right in the property identified by the process of tracing
    - Personal remedy against the holder of the identified assets to make restitution for the amount that the holder has been unjustly enriched
    - If the painting can be followed from the trustee into the hands of x into the hands of y, you can still choose to trace your painting into the hands of y in the form of £10k

Tracing/Following at Common law

The essence of tracing is that where the original property cannot be followed, it is necessary for the claimant to show that the value of the property in which he or she originally had a proprietary interest can be identified in property that has been received by the defendant

- The right to trace belongs to the legal owner
- The orthodox view is that it is possible to trace property into an exchange-product so long as the product is identifiable as such
- The property will cease to be identifiable property capable of being traced when it becomes compromised in a mixed fund

These rules apply where the claimant's proprietary base is a legal, rather than an equitable, proprietary right

- Common law tracing cannot be used to identify assets to be the subject of an equitable claim, and equitable tracing cannot do that for the subject of a common law claim
- If you only have legal rights to property that has been misappropriated, you trace at law

You can follow a particular item of property in different hands, and trace it, but if you lose or fail to show a direct connection between property in its original form and the property in its new form, then you cannot use common law tracing

In the case of *Lipkin Gorman v Karpnale* a partner had lost a lot of his company's money; they had right to getting money back but the partner didn't have any to give back and so they sought to trace it.

- Tracing will try to establish that the defendant had the money and was unjustly enriched by receiving it
- In this case, tracing is a process under law and the claimant's would have to show that the money was paid by the thief to the defendants and that they had been unjustly enriched
- Lord Templeman said that if the thief had paid £20k taken from a firm to a car dealer and the dealer had given him a car worth £20k, then the car dealer would have received the stolen money but would he be regarded as being unjustly enriched
    - Chips were given but this wasn't legal tenure; club had been unjustly enriched in this case then
- Introduces idea of unjust enrichment and having to make restitution if you are unduly enriched.

In *Trustee of FC Jones* , after the act of bankruptcy Mr Jones wrote a cheque to his wife for £11.7k from the firm's account

- She placed the money in a brokerage to invest in potato fields, and this grew eventually to £50k and then proceeded to place this money into ''Rafael's PLC''. The question was whether the mixing of chattels was accidental or deliberate
- Held this wasn't a case of constructive trust, and wasn't a claim in equity; she had no title to the money in law or equity but was merely in possession of it
    - Was a case of tracing at law, and the person with legal right to the money was the trustee
    - Belonged legally at law to the trustee in bankruptcy and they could trace this money into her account etc
    - Because there was a chain of straight substitutions from the money in the partnership account to the chose in action representing the funds deposited at the wife's bank account, the trustee could trace at law into the profits that had been credited to the wife's bank account
- Claimant will be able to identify the value of his or her property in the substitute for that property as long as the substitute hasn't become mixed with other property so that it loses its identity
- Was also held in this case that a claimant can also trace at law into the profits that were made from the use of his or her property

Limitations on the right to trace at common law

When money is mixed:

- Felt common law cannot provide a remedy
- The case of *Taylor v Plumer* made it clear that a major limitation on tracing at common law is that it isn't possible to trace into a mixed product, save where it is possible to separate the components of the product.
- Limitation is that if the property becomes mixed with other, then your right is lost in law

When the money is cleared by a bank:

- *Bank Tejerat* something the subject of a telex meant the right to trace was refused at law

Lord Millet even argued that it was better to abandon the common law and said ''in all but the simplest cases recourse to the common law should be abandoned, attempt to rationale and develop the common law rules are unlikely to succeed and shouldn't be pursued''

Tracing in equity

Plaintiff has an equitable proprietary interest; question is whether a fiduciary or quasi-fiduciary relationship is also necessary

Tracing in equity – you can trace into and through mixed funds – into the hands of third party recipients

- The right to trace in equity belongs only to a person with an equitable interest in the property
- Difference in approach between law and equity has been expressed in terms that the common law views property as physical asserts, whereas equity is able to view property metaphysically; said in *Re Diplock*
- The property must have "been the subject of fiduciary obligations before it got into the wrong hands." per Lord Millett
- Leaves you better placed essentially
- Great advantage is you can claim into, through mixed funds, compared to in law

Fiduciary relationship

A fiduciary relationship has been widely defined. It isn't necessary for it to exist initially. Controversially it may be possible for a fiduciary relationship to be created where money is wrongly paid over by mistake.

There is a limitation in tracing in equity; property in question must have been subject to some fiduciary relationship prior to its misappropriation, and this case provides the rationale

- Necessary to show that the property in which the claimant had an equitable proprietary interest passed to the defendant through the hands of a fiduciary in breach of duty; essentially there must have been an unauthorised disposition of property

In the case of ***Re Diplock*** Lord Greene MR said that ‘’one whose money has been mixed with that of another may trace his money into the mixed fund though such fund be held, and even though the mixing be done, by an innocent volunteer, provided there was a) originally such a fiduciary or quasi-fiduciary relationship between the claimant and the recipient of his money as to give rise to an equitable proprietary interest in the claimant; b) the claimant’s money is fairly identifiable; and c) the equitable remedy available, i.e. a charge on the mixed fund or its assets, does not work an injustice.”

- Diplock left his residuary estate for charitable purposes and the trustees thought this was a charitable trust and proceeded to give away around £200k to various charities. However, the money was held to belong to the next of kin but this was discovered too late. Charity were innocent volunteers who were unaware they had received this money in breach of a fiduciary relationship. Question was if they could get their money back

- Lord Greene stated the above and said this can be done if

    - 1) there was an initial fiduciary relationship capable of giving rise to a relationship

    - 2) was clearly/fairly identifiable

    - 3) taking a charge back over it doesn’t work an injustice

- Where the defendant is in a fiduciary relationship with the claimant and mixed his money with his own, claimant takes priority

- The claim of the next of kin to recover the money distributed to the charities succeeded despite their money being mixed in some cases with the money already held by the charities in bank accounts

    - Didn’t matter that there was no fiduciary relationship between the next of kin and the charities because it was sufficient that there was a prior fiduciary relationship between the next of kin and the executors, who had transferred the estate in breach of fiduciary duty

In ***Chase Manhattan Bank***, the bank acting on instructions paid over $2m and another employee made an error and transferred the money again. Defendant was later found to be insolvent and was wound up; action was brought to trace the money to the defendant bank

- Legal rights are no longer of any use due to insolvency

- Did they have a right to trace in equity and if there was a fiduciary relationship

    - Not necessary to be in a fiduciary relationship before the money got into the wrong hands; at the moment they received it, they knew they were holding it on trust for the original transferor

- "That the fund to be traced need not [as in *Diplock*] have been subject to fiduciary obligations before it got into the wrong hands"

Lord Browne-Wilkinson in the case of *Westdeutsche Landesbank* didn't overrule the decision in *chase* but disagreed with it

- Said on the facts, *Chase* was correctly decided, retention of money after did give rise to a constructive trust.
- But on principle that there need not be a fiduciary relationship before, that is where he disagreed
- Whilst "the mere receipt of the money in ignorance of the mistake, gives rise to no trust, the retention of the money after the recipient bank learned of the mistake may well have given rise to a constructive trust"

In *El Adjou* the court found a claimant retained an equitable interest in the property; thief would hold property on constructive trust for the victim

- Unconscionability would give rise to the requisite fiduciary relationship in these circumstances

Mixing in active bank account of the trustee

There are different ways in which money can be mixed

Money which has been taken and mixed with that of the person who took it

- If the misappropriated property remains identifiable and merely passes from hand to hand, the claimant can follow it back, or you can trace it into the substitute
- Traditional approach set out in *Re Hallett's* where he sold bonds belonging to himself and his clients, but collective money was stored in his account
    - First presumption is that the fiduciary in this case spent his or her own money first, so the claimant will be able to trace into the sum remaining in the fund
    - Court of appeal held the fiduciary will be presumed to have drawn out and spent his own money first; meaning whatever is left will belong to the principal/beneficiary
    - Held that the person who was in a fiduciary relationship with both the trustees and the client, should be presumed to have drawn his own money out of the account first, so that the money that remained credited to the account could be distributed between the trustees and the client
    - Where a trustee mixes his own funds with trust funds in a bank account – he is presumed to have withdrawn his own money first
    - Rule can lead to peculiar results
- In *Re Oatway* there was sufficient money remaining in the bank account after withdrawal to meet the claimant's needs, but later proceeded to withdraw the rest. This demonstrates the alternative presumption to the one stated above

whereby the fiduciary spent the claimant's money first. Claimant will want to rely on this presumption where the fiduciary has used money from the mixed fund to purchase an asset and dissipated the remaining amount of the fund; claimant can trace into the purchased asset by presuming that the fiduciary intended to purchase that asset using the claimant's money rather than his or her own money.

- Joyce J held beneficiaries were entitled to the investments if their right could be identified from any of the funds
- "Whatever alteration of form any property may undergo, the true owner is entitled to seize it in its new shape if he can prove the identity of the original material" per Joyce, J.
- This case says that in the situation where it looks like the beneficiary's money which has been spent, the beneficiaries should be satisfied before anyone else

Not altogether clear from these decisions if ***Hallett's*** decision should apply first or do they have a choice

In situations where your money has been taken and mixed, there is a choice Lord Millett in ***Foskett*** showed how one has a choice from where to derive their money from

If a trustee has £1k in a bank account and takes it from a trust fund and mixes it altogether, upon the balance depleting the beneficiary's cannot then have access to any subsequent instalment he derived from elsewhere

- Where the asset in which the claimant has an equitable interest has been destroyed, or where the fund has been dissipated and no specific asset can be identified that derives from it, tracing will fail.
- If anything else is added after the account reaches £0, they have no access
- In the case of ***Roscoe v Winder*** this idea was illustrated in regard to where the claimant's money is used to discharge a debt, such as where it is paid into an overdrawn bank account, there will be no asset that can be considered to represent the claimant's property and so tracing will be defeated
    - In ***Roscoe*** at one point there was only £25 left in the account but a few years later it rose to £358 and essentially it was held the beneficiaries couldn't trace into this
    - Sums paid into subsequent to the £25 were not deemed to be payments to the fund and were paid to all general creditors
    - If a mixed fund reaches nil, the tracing will end; money which comes from a different source means the trustees won't be given access to any money
    - Where a trustee deposits money in an account after he has dissipated the beneficiaries money – there will NOT be a presumption that the trustee intended to replenish the beneficiaries money – 'lowest intermediate balance' principle

Mixing with other trust funds or innocent volunteers

Here we arent mixing with the person who took it, but with other principles. ***Re Diplock*** showed in such circumstances they will share

- Beneficiaries share *pari passu*; rateably
- In proportionate shares or according to the proportion contributed by each trust fund

But if the unauthorised mixed fund consists of 2 sets of innocent people who have had their things misappropriated, and is put into a mixed active current account, there is an exception to the ***Diplock***; known as the rule in ***Clayton's Case***

- Must be noted before that the rule from this case doesn't apply if payments are specifically earmarked
- If money is put into a current bank account then the ***Clayton*** rule will apply
- Where a trustee mixes funds making up an active current account, the rule is ''first in first out''
- Can be quite harsh in application
    - Described as precacious and arbitrary by Lord Goff

However courts have found ways around the ***Clayton*** rule as demonstrated in ***Barlow v Vaughan***

- Confirmed the rule in ***Clayton*** as prima facie rule in such a situation, but where it would be impractical or contrary to the express or implied intention of the investors then it shouldn't be followed
- Could look at alternatives to find an equitable solution; proportionate shares

In the case of ***Russell v Prentis*** Lindsay J wasn't prepared to overrule the principle, but it could be easily displaced where there was an express or implied counter provision

- "It might be more accurate to refer to the exception that is – rather than the rule in ***Clayton's*** case"

Limits on the right to trace

Disposal to a bona fide purchaser for value of a legal estate without notice

- As shown in ***Westdeutche Landesbank*** bank

Acquiescence by the beneficiary in wrongful mixing

Defence of change of position

- Defence of position has traditionally been denied
- If they can show they changed their position detrimentally as a result of innocently receiving the property, it would be unfair to put them back

Where one party is equity's darling

Where the trust property is no longer recognisable or is dissipated

- As in *Borden UK Ltd*

Where the money was used to pay a debt

- In the case of *Bishopgate Investment v Homan*

END OF COURSE